No. 87-602-CFY
Status: GRANTED

Title: William A. Kilpatrick, et al., Petitioners
v.
United States

Docketed:
October 13, 1987

Court: United States Court of Appeals
for the Tenth Circuit

Vide:
87-578

Counsel for petitioner: Cohan,William A.

Counsel for respondent: Solicitor General

Entry	Date	Note	Proceedings and Orders
1	Oct 13 1987	G	Petition for writ of certiorari filed.
3	Nov 10 1987		Order extending time to file response to petition until December 14, 1987.
4	Dec 14 1987	X	Brief of respondent United States in opposition filed. VIDED.
5	Dec 16 1987		DISTRIBUTED. January 8, 1988
6	Jan 11 1988		Petition GRANTED. limited to Question 1 presented by the petition. The case is consolidated with 87-578, and a total of one hour is allotted for oral argument. **********
7	Feb 22 1988		Brief of petitioner William A. Kilpatrick filed.
9	Feb 25 1988		Brief amicus curiae of Natl. Assn. of Criminal Defense Lawyers filed. VIDED.
12	Feb 25 1988		Joint appendix filed. VIDED.
13	Feb 25 1988		Brief amici curiae of ACLU, et al. filed. VIDED.
10	Feb 26 1988	G	Motion of petitioners for leave to file portion of joint appendix under seal filed.
8	Feb 27 1988		Record filed.
		*	Certified copy original record and proceedings - 3 boxes- Box 1 rec'd 2-26-88. Box 2 & 3 re'd 2-27. (Sealed).
11	Feb 29 1988		DISTRIBUTED. March 4, 1988. (Above motion to file portion of joint appendix under seal).
14	Mar 7 1988		Motion of petitioners for leave to file portion of joint appendix under seal GRANTED.
15	Mar 10 1988	D	Motion of petitioners for divided argument filed.
17	Mar 11 1988		SET FOR ARGUMENT, Wednesday, April 27, 1988. (1st case). This case is consolidated with 87-578. 1 hour.
16	Mar 21 1988		Motion of petitioners for divided argument DENIED.
18	Mar 28 1988		Brief of respondent United States filed. VIDED.
19	Mar 31 1988		CIRCULATED.
20	Apr 19 1988	X	Reply brief of petitioner William A. Kilpatrick filed.
21	Apr 27 1988		ARGUED.

Supreme Court, U.S.
FILED
OCT 13 1987
JOSEPH F. SPANIOL, JR.
CLERK

87-602

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

WILLIAM A. KILPATRICK, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

WILLIAM A. COHAN *
DAROLD W. KILLMER
COHAN, GREENE & KILLMER, P.C.
1801 York Street
Denver, Colorado 80206
(303) 321-0999
Attorneys for Petitioners William A. Kilpatrick, Declan J. O'Donnell and Sheila C. Lerner

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

I. Whether a federal court may dismiss an indictment before trial based upon its supervisory powers without a finding of prejudice to the defendant in order to protect the integrity of the judicial system?

II. Whether a Court of Appeals may substitute its own findings of fact even when the facts found by the District Court were specifically premised on credibility determinations based on live testimony?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the Court of Appeals for the Tenth Circuit were the United States of America, William A. Kilpatrick, Declan J. O'Donnell, Sheila C. Lerner, Michael J. Alberga, C.S. Gill, C.M. Smith, and the Bank of Nova Scotia.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS	i
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE PETITION	13
I. REQUIRING PROOF OF PREJUDICE AS A PREREQUISITE TO DISMISSING AN INDICTMENT BASED ON THE COURT'S SUPERVISORY POWERS CONFLICTS WITH DECISIONS OF THIS COURT AND WITH OTHER CIRCUIT COURTS OF APPEALS	13
A. The Tenth Circuit Applied a Requirement of Prejudice as a Prerequisite to Dismissal Pursuant to the District Court's Supervisory Powers	13
B. Application of the Requirement of Prejudice as a Prerequisite to a Court's Exercise of its Supervisory Powers Conflicts with Decisions of this Court	14
C. The Tenth Circuit's Decision Highlights a Conflict Between the Circuits Which this Court Should Resolve	16
II. RECENT DECISIONS OF THIS COURT PROHIBIT THE *DE NOVO* REVIEW ENGAGED IN BY THE CIRCUIT COURT	17

TABLE OF CONTENTS—Continued

	Page
A. The Tenth Circuit Acknowledged that Review of Findings of Fact is Governed by the "Clearly Erroneous Standard," Then Engaged in *De Novo* Review	17
B. *De Novo* Review Resulted In Substitution of Facts Contrary to those Found Even When Specifically Premised on Credibility Determinations Based on Live Testimony	18
C. *De Novo* Review and Appellate Substitution of Facts In Place of Those Found By the Trial Court Based on Live Testimony Conflicts with Decisions of this Court	22
CONCLUSION	24
APPENDIX A	1a
APPENDIX B	4a
APPENDIX C	49a
APPENDIX D	109a
APPENDIX E	121a
APPENDIX F	157a

TABLE OF AUTHORITIES

CASES: Page

Anderson v. Bessemer City, 470 U.S. 564 (1985) 17, 22-23
Blondin v. Winner, 822 F.2d 969 (10th Cir. 1987) 2
Campbell v. United States, 373 U.S. 487 (1963) 17
Massiah v. United States, 377 U.S. 201 (1964) 11
Maine v. Taylor, 470 U.S. 564 (1986) 23
McNabb v. United States, 318 U.S. 332 (1943) 16
United States v. Estepa, 471 F.2d 1132 (2d Cir. 1972) 16
United States v. Griffith, 756 F.2d 1244 (6th Cir.), *cert. denied*, —— U.S. ——, 106 S. Ct. 114 (1985) 17
United States v. Jacobs, 547 F.2d 722 (2d Cir. 1976), *cert. dismissed*, 436 U.S. 431 (1978) 16
United States v. Kilpatrick, 575 F.Supp. 325 (D. Colo. 1983) *passim*
United States v. Kilpatrick, 594 F.Supp. 1324 (D. Colo. 1984) *passim*
United States v. Kilpatrick, 821 F.2d 1456 (10th Cir. 1987) *passim*
United States v. McKenzie, 678 F.2d 629 (5th Cir.), *cert. denied*, 459 U.S. 1038 (1982) 17
United States v. Serubo, 604 F.2d 807 (3rd Cir. 1979) 16
Vasquez v. Hillery, —— U.S. ——, 106 S.Ct. 617 (1986) 15
Young v. United States ex rel. Vuitton Et Fils S.A., —— U.S. ——, 107 S.Ct. 2124 (1987) 15

STATUTES:

18 U.S.C. Sec. 6002 2
18 U.S.C. Sec. 6003 2

RULES:

Federal Rules of Criminal Procedure

Rule 6(d) 12
Rule 6(e) 9, 12, 18

OTHER AUTHORITIES:

United States Constitution

Fifth Amendment 2, 10, 13

IN THE

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OCTOBER TERM, 1987

No.

WILLIAM A. KILPATRICK, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Petitioners, by and through counsel William A. Cohan and Darold W. Killmer of the law firm of Cohan, Greene & Killmer, petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinions of the district and appellate judges are reprinted in the appendices to this petition and reported as indicated below:

(1) *United States v. Kilpatrick*, 575 F.Supp. 325 (D. Colo. 1983) (per Winner, J.).

(2) *United States v. Kilpatrick*, 594 F.Supp. 1324 (D. Colo. 1984) (per Kane, J.).

(3) *United States v. Kilpatrick*, 821 F.2d 1456 (10th Cir. 1987) (per Holloway, J. and Bohanon, J., with a dissenting opinion by Seymour, J.).

(4) *Blondin v. Winner*, 822 F.2d 969 (10th Cir. 1987) (per Seymour, J.).

JURISDICTION

The opinion of the court of appeals was filed on June 18, 1987. A timely filed Petition for Rehearing and Suggestion for Rehearing En Banc was denied on August 19, 1987. The jurisdiction of this Court is invoked under Title 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

This case involves the Grand Jury and Due Process clauses of the Fifth Amendment to the United States Constitution, 18 U.S.C. §§ 6002 and 6003, and Rule 6 (d) and (e) of the Federal Rules of Criminal Procedure, which collectively constitute Appendix F.

STATEMENT OF THE CASE

A. Procedural History

After a twenty month investigation before two successive grand juries, this case began with the return of a twenty-seven count indictment charging seven individuals and the Bank of Nova Scotia with conspiracy, and charging several of the individual defendants with mail fraud and/or tax fraud.[1] On February 21, 1983, the district court, the Honorable John L. Kane Jr., presiding, dismissed the first twenty-six counts of the indictment for failure to charge a crime and as improperly pleaded. *United States v. Kilpatrick*, 594 F.Supp. 1324, 1327 (D.

[1] While several defendants were charged, this Petition for Writ of Certiorari is made on behalf of Defendant-Petitioners Kilpatrick, O'Donnell, and Lerner.

Colo. 1984).[2] Judge Kane's opinion is made a part of this Petition as Appendix C. The government appealed the dismissal of those counts.[3]

On August 8, 1983, after briefing but before oral argument, the Tenth Circuit Court of Appeals entered an order partially remanding the case to the district court to determine whether misconduct on the part of the government prosecutors in connection with the grand jury investigation and presentation constituted additional grounds for dismissal.

Before and immediately after the partial remand by the Tenth Circuit, the Honorable Fred M. Winner, Senior United States District Judge, presided over post-trial motions hearings following a guilty verdict against Mr. Kilpatrick on Count 27 of the indictment. On August 25, 1983, at about the time of his retirement from the bench, Judge Winner issued a Memorandum decision which, among other things, summarized the status of the hearings which were being reassigned to Judge Kane. Further, Judge Winner ordered that the government provide defendants with copies of transcripts of all proceedings that occurred before the grand jury. After what Judge Kane has called "some bizarre episodes of procedural novelty," Judge Winner's opinion was published. *See United States v. Kilpatrick*, 575 F.Supp. 325 (D. Colo. 1983), made Appendix E of this Petition. Judge Winner also granted Kilpatrick a new trial on the obstruction of justice count.

[2] The twenty-seventh count, charging Defendant Kilpatrick with obstruction of justice, was not initially dismissed.

[3] In addition to dismissing the counts against the individual defendants, Judge Kane dismissed the charges in which the Bank of Nova Scotia (Bank) was named on the ground that the indictment failed to allege that the Bank or any of its representatives had the requisite knowledge and intent to commit the crime charged. *Kilpatrick*, 594 F.Supp. at 1327. The government appealed the dismissal of these counts also.

After holding ten days of hearings, District Judge Kane dismissed all twenty-seven counts of the indictment because of prosecutorial misconduct. His Order was as follows:

> Based on the foregoing I hold and ORDER as follows:
>
> 1. The indictment is dismissed because of the numerous violations of Rule 6(d), Fed.R.Crim.P.
>
> 2. The indictment is dismissed because of the numerous violations of Rule 6(e), Fed.R.Crim.P.
>
> 3. The indictment is not dismissed solely for the use of "pocket immunity" in contravention of 18 U.S.C. Secs. 6002 and 6003.
>
> 4. The indictment is not dismissed solely for violations of the Fifth Amendment to the United States Constitution.
>
> 5. The indictment is not dismissed solely for the knowing and deliberate presentation of misinformation to the grand jury.
>
> 6. The indictment is not dismissed solely for violations of the Sixth Amendment to the United States Constitution.
>
> 7. The indictment is dismissed because of the totality of the circumstances which include numerous violations of Rule 6(d) and (e), Fed.R.Crim.P., violations of 18 U.S.C. Secs. 6002 and 6003, violations of the Fifth and Sixth Amendments to the United States Constitution, knowing presentation of misinformation to the grand jury and mistreatment of witnesses.

Kilpatrick, 594 F.Supp. at 1353.

The government appealed these dismissals, and the appeals were consolidated in the Tenth Circuit with the appeals challenging the initial dismissals.

On June 18, 1987, a split panel of the Tenth Circuit Court of Appeals reversed the district court and

remanded the case with instructions to reinstate all counts of the indictment. *United States v. Kilpatrick*, 821 F.2d at 1456 (10th Cir. 1987), is made a part of this petition as Appendix B. Judge Seymour dissented from the decision.

A timely filed Petition for Rehearing and Suggestion for Rehearing En Banc was denied by the Tenth Circuit Court of Appeals on August 19, 1987. On September 3, 1987, the Tenth Circuit granted a motion to stay the issuance of the mandate until October 3, 1987. This stay was extended until October 12, 1987 upon Petitioner's motion filed September 29, 1987.

B. Background

As Senior District Judge Fred M. Winner noted, "[t]o fully cover all of the headaches of this case would require a volume." *United States v. Kilpatrick*, 575 F.Supp. 325, 326 (D.Colo. 1983). Throughout the course of the twenty month investigation and presentation to the grand jury, government attorneys engaged in systematic improprieties and misconduct sufficiently severe that three of the five judges who have evaluated that conduct found it required dismissal of the indictment (i.e., Judge Winner, Judge Kane and Judge Seymour). Judge Seymour noted in her dissenting opinion in the Court of Appeals that:

> It is beyond argument that the Government's conduct in this case was outrageous. As set out in two district court opinions, *United States v. Kilpatrick*, 594 F.Supp. 1324 (D.Colo. 1984), and *United States v. Kilpatrick*, 575 F.Supp. 325 (D.Colo. 1983), the record contains evidence constituting a laundry list of serious improprieties, most of which the majority neither disputes nor condones. Government officials repeatedly violated Fed.R.Crim.P. 6(d) by presenting two witnesses to the grand jury at the same time. *See* maj. op. at 1467-68, 1470. The Government

routinely flouted the secrecy provisions of Fed.R. Crim.P. 6(e). First, it improperly used grand jury information in civil tax audits of taxpayers who invested in the tax shelters at issue, *see* maj. op. at 1471; second, it improperly disclosed the identity of the grand jury targets to people who were not grand jury witnesses who had formerly represented the tarness and professional relationships, *see id.* at 1472, and third, it improperly swore to secrecy two grand jury witnesses who had formerly represented the targets in S.E.C. proceedings involving the same tax shelters, *see id.* at 1472. During a recess a Government attorney mistreated a tax expert, who had testified before the grand jury favorably to the targets, by shouting insults at and intimidating him in the presence of grand jurors, other witnesses, and attorneys. *See id.* at 1472-73.

In addition, the Government attorney paraded seven witnesses before the grand jury knowing that they would invoke their Fifth Amendment privilege to refuse to answer any questions. I cannot agree with the majority's conclusion in footnote 19 that any prejudice arising from this presentation to the grand jury was eliminated by the prosecutor's admonition. The grand jurors had previously questioned the prosecutors on the use of the privilege, displayed frustration over its invocation, and discussed pursuing the matter with the district court to test the privilege. [Cite to record]. Significantly, one grand juror stated: "I know that we are not supposed to think anything when they take the Fifth Amendment; being human, we do." [Cite to record]. In view of this candid admission, the potential for prejudice arising from seven witnesses' refusal for fear of incrimination to discuss their involvement in the very matters upon which the grand jury was asked to indict cannot be denied. *Cf. United States v. Coppola*, 479 F.2d 1153, 1160 (10th Cir. 1973) (condemning conscious effort by Government to derive evidentiary value from adverse inference arising from invoking the privilege). Consequently, this

> court has held that it is improper for the Government to call a witness knowing that he will assert his Fifth Amendment privilege. *See id.*; *see also United States v. Crawford*, 707 F.2d 447, 449 (10th Cir. 1983).

United States v. Kilpatrick, 821 F.2d at 1476 (Seymour, J., dissenting) (footnote omitted).

Judge Kane dismissed the indictment, outlining an astounding chronology of prosecutorial misconduct. In the section of his opinion entitled "FACTS ESTABLISHED BY THE RECORD," Judge Kane explained that various IRS Special Agents had been sworn in as "agents of the grand jury" despite instructions by the impaneling court that the grand jury should maintain its independence and not develop into a "prosecutor's agent." *Kilpatrick*, 594 F.Supp. at 1328. Judge Kane specifically found that "the prosecutor's description to the grand jury of the role of a 'grand jury agent' clearly misled the grand jury as to the appropriate role of the IRS agents in the proceedings." *Id.* The grand jury was consistently reminded of the unique role of the "grand jury agents", and urged to rely upon the IRS agents as their (the grand jury's) agents. These agents did more than assist the prosecutors in the investigation. They were used to summarize evidence in front of the grand jury. These summaries, Judge Kane found, were frequently inaccurate and seriously misleading. *Id.* at 1330, 1339-1341. It was also clear that the "grand jury agents" were not present as witnesses. They were not sworn; they appeared together; they were not examined; and they were often unaccompanied by government attorneys. *Id.* at 1330. The record indicates that these agents may have convened the grand jury sessions without government counsel in order to read testimony. *Id.*

The district court also found that "[d]uring the course of the grand jury investigation, the government representatives systematically disregarded the strictures of Rule 6(e)." *Id.* at 1331. Numerous individuals at all

levels of the IRS were improperly permitted access to the grand jury materials in violation of Rule 6(e). Beyond disclosure, however, are the instances of improper use of the grand jury materials. *Id.* at 1332-34. Finally, the district court found that "[s]everal instances demonstrate blatant disregard for the time-honored tradition of grand jury secrecy." *Id.* at 1334. Letters were sent to individuals beyond the subpoena power of the grand jury, with whom it was understood the targets had ongoing business and professional relationships. The letters were written on the letterhead of the U.S. Attorney, but signed by supposed agents of the grand jury. Judge Kane found these letters not only misleading in terms of the capacity in which they were sent, but also presented a clear danger to the acknowledged business and professional relationships. *Id.* The impropriety of publicly identifying targets in these letters was readily apparent to Judge Winner:

> [T]he identity of the persons and the transactions which were under grand jury scrutiny shouldn't be disclosed to anyone by letter or otherwise, but these startling letters did precisely that.

575 F.Supp. at 334.

Judge Kane found that the repeated breaches of secrecy and "prejudicial disclosure of the targets and the nature of the grand jury's investigation" extended beyond the "startling letters." 594 F.Supp. at 1335. The court wrote of one instance where grand jury information was shared with a witness and one-time potential target in an attempt to persuade him to assist in the government's investigation by suggesting that the grand jury had received evidence warranting his consideration as a target. *Id.* This witness was once left unattended in a room housing grand jury material. He admitted to seizing the opportunity to rummage through the grand jury documents. Prosecutors also accused him of making

extortionate threats to one of the targets of the investigation. *Id.*

The district court further found that "[f]or what the record reveals was clearly an improper strategic purpose, secrecy obligations in clear violation of Rule 6(e)(2), Fed.R.Crim.P., were imposed upon two grand jury witnesses." *Id.* at 1335. The government admitted to these violations, and Judge Kane found that "the confessed violations of Rule 6(e) were neither innocent nor inadvertent." *Id.* Both of the witnesses upon whom secrecy obligations were imposed occupied positions as attorneys who had formerly represented two targets of the investigation. The record clearly illustrates that the government attorneys were well aware that such secrecy obligations are prohibited by Rule 6(e) (and by the United States Attorneys' Manual), and, although provided with ample opportunity, the government attorney was unable to offer any legitimate reason for his transgressions. *Id.* at 1336.

Next, the district court found that "[d]uring this investigation, Department of Justice attorneys ignored entirely the federal immunity statute (18 U.S.C. Secs. 6001, *et seq.*) which prescribes the congressionally authorized procedure for conferring grants of immunity and, instead, secured testimony by engaging extensively in what I have described as the 'damnable practice' of bestowing 'informal immunity' through 'letters of assurance.'" *Id.* at 1336. The prosecutors undertook what was described as a "liberal policy" of distributing informal immunity to witnesses. At no time was an effort made to obtain statutory immunity for any witness. The government attorneys readily conceded that they chose this method simply for the sake of expediency—to by-pass the review established by Congress in the statutory scheme. *Id.* at 1337. The record reveals that the prosecutors were motivated at least in part by the fact that the informal immunity process would avoid the statistical

compilation that Congress indicated as among its purposes for establishing the statutory procedure. *Id.* Both Judge Kane and Judge Winner noted that the use of this informal immunity served to intimidate the witnesses, leaving them with the fear that unless their testimony pleased the government, the government might withdraw its assurances. *Id.*, 594 F.Supp. at 1338; 575 F.Supp. at 335.

The district court next addressed the events surrounding the "abusive and dubious practice of calling witnesses who had not been issued letters and having them invoke their Fifth Amendment privilege before the grand jury regarding the targets and the transactions under investigation, knowing in advance that they would do so." 594 F.Supp. at 1338. Judge Kane found that:

> In all, seven witnesses were called to invoke their privilege in February and March, 1982. That the purpose was to prejudice the grand jury against the targets and the tax shelter transactions under investigation, and not to lay a statutory predicate for immunizing the witnesses (which the prosecutor never did) cannot de denied.

Id. It should be noted that six of these seven witnesses were called *after* the discussion between the prosecutor and the grand juror who stated, "I know that we are not supposed to think anything when they take the Fifth Amendment; being human, we do." G.J. Tr. Jan. 5, 1982, 9:09 A.M. at 22-25. 821 F.2d at 1474.

The district court proceeded to describe the presentation of summaries of "evidence" against the targets. Although the Tenth Circuit Court of Appeals labored under the impression that "no claim was made nor did the [district] court find that the Government attorneys used perjured testimony, knowingly or unknowingly, before the grand jury," *Kilpatrick*, 821 F.2d at 1470 fn. 12, the district court *did* find "the prosecutor erroneously

suggested that the 'evidence' indicated that the Bank of Nova Scotia representatives were familiar with the operation of Kilpatrick's business and that the IRS was to be defrauded by virtue of the banking activity. [Citation to Record]. *No evidence of the kind suggested by the prosecutor had been presented to the grand jury.*" 594 F.Supp. at 1339 (emphasis supplied). The court found that on "the vital issue of the bank's knowledge and intent, however, it is clear that [the special agent's] testimony was both misleading and inaccurate." *Id.* at 1339. Judge Kane concluded that the mischaracterizations reasonably could not have been expected to be picked up by the grand jurors and "undoubtedly formed a substantial basis" for the indictment.

The district court also expounded on how the prosecutors committed numerous *Massiah* violations by interviewing employees of the Bank of Nova Scotia outside of the presence of counsel. Although the prosecutor was fully aware that the bank, an indicted defendant, was represented by counsel, he did not feel constrained by this Court's dictates in *Massiah v. United States*, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964). The prosecutor felt secure that "if he committed a constitutional violation of the type identified in *Massiah*, the only likely sanction was the suppression of the evidence in the government's case-in-chief. In the prosecutor's words, 'no indictment has ever been dismissed because of [a *Massiah* violation]' " 594 F.Supp. at 1342.

Lastly, the district court described the incident where a government attorney browbeat and intimidated a tax expert who testified before the grand jury favorably to the targets of the investigation. The prosecutor's heated argument occurred outside of the grand jury room but in front of attorneys, members of the grand jury, and other witnesses. Such prosecutorial misconduct prompted one of the witnesses to the incident, a former Department

of Justice and Colorado United States Attorney's Office attorney, to write a letter to Judge Sherman G. Finesilver of the District of Colorado reporting the incident. The tax expert, Professor Hjorth, testified that the prosecutor's conduct was so abusive that he would never again appear as an expert witness in a similar proceeding. *Id.* at 1343.

The district court dismissed the indictment based upon the violations of Rule 6(d) and (e), Fed.R.Crim.P., and upon the "totality of the circumstances" surrounding the cumulation of all of the other incidents of prosecutorial misconduct. Judge Kane noted that

> While the remedy of dismissal is extraordinary, it may be used 'to insure proper standards of conduct by the prosecution.' [Citation]. District courts are also empowered to dismiss indictments because of inherent supervisory powers which protect the integrity of the judicial system. [Citation]. Isolated errors and improprieties do not require dismissal of the indictment. It is only when the government engages in deliberate conduct which interferes with the grand jury's independent function or damages the integrity of the judicial process that the remedy of dismissal becomes necessary. Because I find that the government engaged in a pattern of conduct calculated to infringe the grand jury's ability to exercise independent judgment, the indictment must be dismissed.

Id. at 1351-52, *quoting United States v. Anderson*, 577 F. Supp. 223, 230 (D. Wyo. 1983).

REASONS FOR GRANTING THE PETITION

I. REQUIRING PROOF OF PREJUDICE AS A PREREQUISITE TO DISMISSING AN INDICTMENT BASED ON THE COURT'S SUPERVISORY POWERS CONFLICTS WITH DECISIONS OF THIS COURT AND WITH OTHER CIRCUIT COURTS OF APPEALS

A. The Tenth Circuit Applied a Requirement of Prejudice as a Prerequisite to Dismissal Pursuant to the District Court's Supervisory Powers.

The Tenth Circuit's majority opinion recognized that there are at least two distinct bases upon which a federal court might dismiss an indictment: (1) The Fifth Amendment Due Process Clause, and (2) Supervisory Powers inherent in federal courts.

> A court may dismiss [an indictment] on the bases of the Fifth Amendment Due Process or Grand Jury Clauses. [Footnote omitted]. The constitutional concerns focus on the fairness to the defendant and on remedying any harm to his basic rights. *See McClintock*, 748 F.2d at 1284; *Pino*, 708 F.2d at 530-31.
>
> A court may also dismiss an indictment by relying on its supervisory powers. *See Pino*, 708 F.2d at 530. The supervisory powers theory is premised on the federal courts' inherent ability to "formulate procedural rules not specifically required by the Constitution or the Congress." *United States v. Hasting*, 461 U.S. 499, 505, 103 S.Ct. 1974, 1978, 76 L.Ed.2d 96 (1983). The supervisory powers theory focuses on deterring illegality and protecting judicial integrity. . . . [Citations omitted] *However, the common theme of the cases is that prosecutorial misconduct alone is not a valid reason to dismiss an indictment.* (Emphasis supplied).

United States v. Kilpatrick, 821 F.2d at 1465.

In her dissenting opinion, Circuit Judge Seymour crystallized her contrary conclusions concerning the ma-

jority's requirement of proof of prejudice to support dismissal based on supervisory powers:

> I respectfully dissent from the view of the majority that prejudice to the defendant must be shown before a court can exercise its supervisory powers to dismiss an indictment on the basis of egregious prosecutorial misconduct. I would affirm.
>
> It is beyond argument that the Government's conduct in this case was outrageous. As set out in two district court opinions [see Appendices C and E], the record contains evidence constituting a laundry list of serious improprieties, most of which the majority neither disputes nor condones. . . .
>
> • • •
>
> Although acknowledging most of the improprieties set out in the lower court opinions, the majority does not agree with the district court that the Government's actions impaired the Grand Jury's ability to exercise its independent judgment, *which is the standard that must be met before the indictment may be dismissed under the Fifth Amendment.* [Emphasis added]. Significantly, the majority also concludes that the sanction of dismissing the indictment is not a proper exercise of a district court's supervisory power unless the same standard is met, that is, unless there is a legally sufficient showing that the Government's misconduct adversely affected the grand jury's independence. Putting aside whether the impact of the Government prosecutors' behavior on the decision-making process of this grand jury can realistically be evaluated, I do not believe that such a showing is a prerequisite to the pre-trial dismissal of an indictment under a court's supervisory power.

Id. at 1476-77.

B. Application of the Requirement of Prejudice as a Prerequisite to a Court's Exercise of its Supervisory Powers Conflicts with Decisions of this Court.

This Court has recently and repeatedly held that federal courts must exercise their supervisory powers to protect the integrity of the judicial system, regardless of demonstrable prejudice. The decision last term in *Young v. United States ex rel. Vuitton Et Fils S.A.*, —— U.S. ——, 107 S.Ct. 2124, —— L.Ed.2d —— (1987), noted:

> In this case, we rely on our supervisory authority to avoid the necessity of reaching any constitutional issues. We are mindful that "reversals of convictions under the court's supervisory power must be approached 'with some caution' and with a view toward balancing the interests involved." [Citation omitted]. Where the interest infringed is sufficiently important, however, *we have not hesitated to find actual prejudice irrelevant when utilizing supervisory authority. See, e.g., Ballard v. United States*, 329 U.S. 187, 67 S.Ct. 261, 91 L.Ed. 181 (1946) (using supervisory power to find error in exclusion of women from grand jury, and dismissing indictment).

Id., 107 S.Ct. at 2138-39 fn. 21 (emphasis added). In *Young*, this Court held some errors are so fundamental that they may not be deemed harmless. "An error is fundamental if it undermines confidence in the integrity of the criminal proceeding." *Id.*, 107 S.Ct. at 2139.

This Court's recent holding in *Vasquez v. Hillery*, —— U.S. ——, 106 S.Ct. 617, 623-4, —— L.Ed.2d —— (1986), reflects a crucial conclusion in Judge Seymour's dissent:

> When consitutional error calls into question the objectivity of those charged with bringing a defendant to judgment, a reviewing court can neither indulge a presumption of regularity nor evaluate the resulting harm . . . and we must presume that the process was impaired.
>
> • • •
>
> The overriding imperative to eliminate this systemic flaw in the charging process, as well as the difficulty of assessing its effect on any given defendant, requires our continued adherence to a rule of mandatory reversal.

In *McNabb v. United States*, 318 U.S. 332, 63 S.Ct. 608, 87 L.Ed. 819 (1943), this Court found it unnecessary to determine whether the defendants had been prejudiced by a constitutional violation before exercising its supervisory power to reverse a conviction. Justice Frankfurter wrote for the Court:

> [T]he scope of our reviewing power over convictions brought here from the federal courts is not confined to ascertainment of Constitutional validity. Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence. Such standards are not satisfied merely by observance of those minimal historic safeguards for securing trial by reason which are summarized as "due process of law" and below which we reach what is really trial by force.

Id. at 340, 63 S.Ct. at 613.

C. The Tenth Circuit's Decision Highlights a Conflict Between the Circuits Which this Court Should Resolve.

As Judge Seymour pointed out in her dissenting opinion:

> The circuits are split on the need to show prejudice. *See United States v. Holloway*, 778 F.2d 653, 658-59 (11th Cir. 1985) (noting authority on both sides of issue), *cert. denied*, —— U.S. ——, 106 S.Ct. 2276, 90 L.Ed.2d 719 (1986).

Kilpatrick, 821 F.2d at 1479 (Seymour, J., dissenting).

The Second and Third Circuits have held that a showing of prejudice is not required to dismiss an indictment. *See United States v. Jacobs*, 547 F.2d 722 (2nd Cir. 1976), *cert. dismissed*, 436 U.S. 431 (1978); *United States v. Estepa*, 471 F.2d 1132 (2nd Cir. 1972); *United States v. Serubo*, 604 F.2d 807 (3rd Cir. 1979).

The Fifth and Sixth Circuits agree with the Tenth Circuit that a showing of prejudice is required. *See United States v. McKenzie*, 678 F.2d 629 (5th Cir.), *cert. denied*, 459 U.S. 1038, 103 S.Ct. 450, 74 L.Ed.2d 604 (1982); *United States v. Griffith*, 756 F.2d 1244, 1249 (6th Cir.), *cert. denied*, —— U.S. ——, 106 S.Ct. 114, 88 L.Ed.2d 93 (1985).

This Court should grant the Petition and resolve the conflict among the circuit courts regarding this important issue of law, which arises in a vast number of criminal cases throughout the country.

II. RECENT DECISIONS OF THIS COURT PROHIBIT THE *DE NOVO* REVIEW ENGAGED IN BY THE CIRCUIT COURT

A. The Tenth Circuit Acknowledged that Review of Findings of Fact is Governed by the "Clearly Erroneous Standard," Then Engaged in *De Novo* Review.

The majority opinion did not explain why it reviewed certain findings of fact under the clearly erroneous standard and others *de novo*. *Kilpatrick*, 821 F.2d at 1467. While initially acknowledging that review was governed by the clearly erroneous standard, the court explicitly engaged in *de novo* review in critical areas. *See Campbell v. United States*, 373 U.S. 487, 83 S.Ct. 1356, 10 L.Ed.2d 501 (1963); *Anderson v. Bessemer City*, 470 U.S. 564, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985).

The majority agreed that there were violations of Rule 6(d), Fed.R.Crim.P. *Id.* at 1467. They further agreed that special agents were not placed under oath while presenting evidence, and that prosecutors often would leave the agents alone with the grand jury. *Id.* at 1468. The majority accepted these facts, but, rejected the trial court's finding of prejudice, and accordingly, found such facts insufficient to support dismissal of the indictment—even with the cumulation of all the other prosecutorial misconduct. *Id.*

Concerning the Rule 6(e) violations, however, the Tenth Circuit intensified its standard of review. Here, the district court *had* found a showing of prejudice. ("In the instant case, however, such showing of prejudice has been convincingly made.") 594 F.Supp. at 1348. The record is replete with descriptions of the systematic violations of Rule 6(e), and voluminous material and persuasive evidence of prejudice. Nevertheless, instead of applying the deferential standard of review, the Tenth Circuit said:

> Assuming that this allegation finds support in the record, we fail to see how the grand jury's independence was usurped in such a significant way as to amount to grand jury abuse.

Id., 821 F.2d at 1471. The majority repeatedly rejected the district court's findings. For example, the court noted that:

> [T]he district court found that the prosecutor's mistreatment of a witness favorable to the defense prejudiced the defendants. We find the mistreatment of the witness, an expert on tax matters, unjustifiable. The mistreatment occurred during a recess but within the hearing of several grand jurors, witnesses, and attorneys. . . . We conclude that the defendants have failed to show how the grand jury's independence was breached.

Id. at 1472-73.

B. *De Novo* Review Resulted In Substitution of Facts Contrary to those Found Even When Specifically Premised on Credibility Determinations Based on Live Testimony.

Even more remarkable than the abbreviated attention given to the obvious impeachment of this witness' testimony was the majority's reticence regarding the improper use of "pocket immunity." The trial court discussed in detail the problems produced by the govern-

ment's informal immunity grants to witnesses before the grand jury. 575 F.Supp. 325, 334-336. Specifically, the court found:

> . . . that there was not compliance with 18 U.S.C. §§ 6002-6003, . . .
>
> This is especially troublesome in this case in light of the record made concerning the witness Richard Bell who was . . . represented by his brother, Malcolm, an attorney practicing in New York City and *a witness I found to be straightforward, fair, convincing, and most generous to* [*the prosecutor*]. (Emphasis added). Malcolm Bell succumbed to the carrot of pocket immunity for his brother, but, later he was told by [the prosecutor] that if Richard "testified for Mr. Kilpatrick, all bets are off." Maybe this meant that if Mr. Bell perjured himself he would be prosecuted for perjury, but if the immunity statute had been followed, the nagging question of the meaning of "all bets are off" wouldn't confront us. Under the statute, all bets weren't off if Richard Bell testified for Mr. Kilpatrick, although he could have been prosecuted for perjury if he testified falsely, but incriminating testimony given by him couldn't be used in a prosecution of the charges with which he was threatened. . . . Grand jurors can't be expected to know the requirements of law concerning lawful immunity grants, and if the prosecutor ignores the statute, the grand jury should be told that witnesses are testifying under a side deal made with the witness by the prosecutor. The nature and informality of the immunity grant might bear on a grand juror's evaluation of the credibility of a witness, especially if the grand juror knew of the short cut used by the prosecution. 575 F.Supp. 325, 335-36.

This crucial finding by the trial court (and others) was given due deference by the dissenting opinion's conclusion that:

> Based on its finding that the Government's conduct was intentional, which includes credibility assess-

ments this court may not lightly disregard, the district court found that "the substantial departures of prosecutors in this case from established notions of fairness, from clearly articulated rules of law, from specific rules of procedure and, indeed, from the Department of Justice's own manual and operating directives constitute systematic and pervasive overreaching. *Id.* The court concluded that the cumulative effect of the Government's conduct prevented the grand jury from undertaking independent action. *Id.* at 1353. 821 F.2d at 1476-77.

The majority completely overlooked the prejudicial impact of the informal immunity granted in this case, devoting a total of two sentences to this topic, which are quoted in their entirety to demonstrate the magnitude of this failure to recognize:

> Second, we have held that the use of "informal immunity," which has been frequently upheld, is entirely proper. [Citation omitted]. Moreover, the defendants have failed to show how the use of informal immunity prejudiced the grand jury. 821 F.2d at 1470. [Footnote omitted].

But the most dramatic demonstration of the majority's apparently unconscious nullification of critical and carefully considered conclusions by the trial court appears in a footnote at 821 F.2d 1470, following the majority's observation that "summaries of evidence given before the grand jury are permissible and often helpful, especially in complicated cases such as this."

> Fn. 12. We note that no claim was made nor did the court find that the Government attorneys used perjured testimony, knowingly or unknowingly before the grand jury.

The majority's assertion that the trial court did not find that perjured testimony was used constitutes pivotal, decisive error; the trial court devoted four pages of its opinion to support its holding that:

> Mendrop's testimony was both misleading and inaccurate. In particular, Mendrop purported to "summarize" . . . the testimony presented by three witnesses. . . . An examination of the grand jury testimony, however, reveals that it was not a summary of the evidence before the grand jury. One of the witnesses whose testimony was "summarized" never appeared before either grand jury. The other two witnesses whose testimony was "summarized" did not give testimony even remotely resembling that supposedly "summarized" by Mendrop. The grand jury was never informed of those mischaracterizations or of any alternative basis for Mendrop's summary.
>
> The inaccurate "summaries" of the evidence . . . was particularly abusive for several reasons: (i) the misleading "summaries" were presented by an individual upon whom the grand jurors had been urged to rely as their "agent,"
>
> • • •
>
> In sum, the mischaracterizations reasonably could not have been expected to be picked up by the grand jurors and, undoubtedly, formed a substantial basis for the indictment. . . . 594 F.Supp. 1339-40.

The majority's misapprehension of the factual and legal conclusions comprising the opinions of the two district judges who conducted the misconduct hearings culminates in the contention that:

> The district court's opinion . . . focuses entirely on the conduct of the prosecutor and not on any resulting prejudice to the defendants.
>
> • • •
>
> The district court erred in focusing primarily on the propriety of the Government's conduct rather than on possible intereference with the integrity and independence of the grand jury.
>
> • • •
>
> Accordingly, we hold that the district court erred in its conclusions that the grand jury's function was

usurped and that the indictment was tainted with illegality, 594 F.Supp. at 1349, 1352, following the *de novo* review we feel we should conduct. *See* Part II-B, *supra*. We are also persuaded that if those determinations are ultimate fact-findings, they are clearly erroneous in light of the record. 821 F.2d 1473-74. [Footnote omitted].

This explanation contradicts the majority's earlier acknowledgment that:

> Our review of whether the prosecutors engaged in specific flagrant or egregious misconduct before the grand jury involves questions of historical fact governed by the clearly erroneous standard. . . . Here, however, the facts are essentially admitted or specifically found by the district court and the law is undisputed . . . we nevertheless conclude that the issue primarily involves the consideration of legal principles, calling for *de novo* review by the appellate court.

821 F.2d at 1467 (citations omitted).

C. *De Novo* Review and Appellate Substitution of Facts In Place of Those Found By the Trial Court Based on Live Testimony Conflicts with Decisions of this Court.

As this Court recently held in *Anderson v. Bessemer City*, 470 U.S. 564, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985):

> [I]n Federal Rule of Civil Procedure 52(a): "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. . . ." The reviewing court oversteps the bounds of its duty under Rule 52 if it undertakes to duplicate the role of the lower court. "In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not

> to decide factual issues *de novo*. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123, 89 S.Ct. 1562, 1576, 23 L.Ed.2d 129 (1969). If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the fact-finder's choice between them cannot be clearly erroneous. . . .
>
> • • •
>
> When findings are based on determinations regarding the credibility of witnesses, Rule 52 demands even greater deference to the trial court's findings; for only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said. 105 S.Ct. at 1511-12.

See also Maine v. Taylor, 470 U.S. 564 (1986).

The majority erred in conducting *de novo* review and supplanting two district courts' findings of fact without determining that the trial judges' accounts of the evidence were implausible in light of the record viewed in its entirety. Since this error clearly conflicts with this Court's decisions it provides another basis for granting the writ in this case.

CONCLUSION

The Petition for Writ of Certiorari should be granted to correct the two fundamental errors made by the Court of Appeals, both of which conflict with this Court's recent decisions: (1) requiring proof of prejudice to support dismissal of an indictment based on supervisory powers; and (2) engaging in *de novo* review of the trial courts' fact findings based on credibility determinations of live testimony and substituting its own findings, without establishing that the trial courts' conclusions were implausible in light of the entire record.

Respectfully submitted,

WILLIAM A. COHAN •
DAROLD W. KILLMER
COHAN, GREENE & KILLMER, P.C.
1801 York Street
Denver, Colorado 80206
(303) 321-0999
Attorneys for Petitioners
William A. Kilpatrick,
Declan J. O'Donnell and
Sheila C. Lerner

• Counsel of Record

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

JULY TERM—August 19, 1987

Before Honorable William J. Holloway, Honorable James K. Logan, Honorable Stephanie K. Seymour, Honorable Stephen H. Anderson, Honorable Deanell R. Tacha, Honorable Bobby R. Baldock, Circuit Judges and Luther L. Bohanon*, District Judge, sitting by designation.

Nos. 83-1363
84-2481

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

WILLIAM A. KILPATRICK,
Defendant-Appellee.

Nos. 83-1364
84-2482

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

DECLAN J. O'DONNELL,
Defendant-Appellee.

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* The Honorable Luther L. Bohanon United States District Judge for the Western District of Oklahoma, sitting by designation.

Nos. 83-1365
84-2483

UNITED STATES OF AMERICA,
Plaintiff-Appellant,
v.
SHEILA C. LERNER,
Defendant-Appellee.

Nos. 83-1366
83-2484

UNITED STATES OF AMERICA,
Plaintiff-Appellant,
v.
THE BANK OF NOVA SCOTIA,
Defendant-Appellee.

Nos. 83-1367
84-2485

UNITED STATES OF AMERICA,
Plaintiff-Appellant,
v.
MICHAEL ALBERGA,
Defendant-Appellee.

Nos. 83-1368
84-2486

UNITED STATES OF AMERICA,
Plaintiff-Appellant,
v.
C.S. GILL,
Defendant-Appellee.

These matters are before the Court for consideration of appellees' petitions for rehearing and suggestions for rehearing en banc.

Upon consideration whereof, the petitions for rehearing are denied by Judges Holloway and Bohanon, to whom these cases were argued and submitted. Judge Seymour, also a member of the hearing panel, voted to grant rehearing.

The Court having been polled on the suggestions for rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, rehearing en banc is denied. Judges McKay and Seymour voted to grant rehearing en banc.

Neither Judge Luther L. Bohanon, a member of the hearing panel, nor Circuit Judge John P. Moore, participated in consideration of the suggestions for rehearing en banc.

/s/ Robert L. Hoecker
ROBERT L. HOECKER
Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 83-1363-1369, 84-2481-2487

UNITED STATES OF AMERICA,
Plaintiff-Appellant,
v.

WILLIAM A. KILPATRICK, DECLAN J. O'DONNELL, SHEILA C. LERNER, THE BANK OF NOVA SCOTIA, MICHAEL ALBERGA, C.S. GILL, and C.M. SMITH,
Defendants-Appellees.

June 18, 1987

Robert E. Lindsay, Tax Div., Dept. of Justice, Washington, D.C. (Glenn L. Archer, Jr., Asst. Atty. Gen., Robert M. Olsen, Acting Asst. Atty. Gen., Michael L. Paup, Alan Hechtkopf and James P. Springer, Tax Div., Dept. of Justice, Washington, D.C., and Robert N. Miller, U.S. Atty., Denver, Colo., were also on the brief) for plaintiff-appellant.

James E. Nesland, Ireland, Stapleton, Pryor & Pascoe, Denver, Colo., for all defendants-appellees (Theodore H. Merriam, Richard K. Rufner and Wagner & Waller, P.C., Englewood, Colo. and William C. Waller, Jr. and Denis H. Mark, Waller, Mark & Allen, P.C., Denver, Colo., were on the brief for defendant-appellee William A. Kilpatrick).

Robert G. Morvillo, Obermaier, Morvillo & Abramowitz, New York City (Robert J. Anello, was on the brief) for defendant-appellee The Bank of Nova Scotia.

Robert D. Grossman, Jr., Grossman and Flask, Washington, D.C. (James L. Treece, Treece, Bahr & Arkey, Littleton, Colo., was on the brief), for defendant-appellee Declan J. O'Donnell.

Shelia C. Lerner, pro se.

Donald E. Van Koughnet, Naples, Fla., for defendants-appellees Michael L. Alberga and Casey S. Gill.

Before HOLLOWAY, Chief Judge, SEYMOUR, Circuit Judge, and BOHANON, District Judge*.

HOLLOWAY, Chief Judge.

After a twenty month investigation conducted before two grand juries, this case began with the return of a twenty-seven count indictment charging all defendants-appellants with conspiracy, and charging several of the defendants additionally with mail fraud and/or tax fraud.[1] Defendant Kilpatrick was charged in Count XXVII with obstruction of justice.

Initially the district court dismissed the first twenty-six counts of the indictment as improperly pleaded and for failure to charge a crime by failing to allege a lack of economic substance in the underlying transactions. *United States v. Kilpatrick*, 594 F.Supp. 1324, 1327 (D.Colo.1984). Following a separate motion by the Bank of Nova Scotia (Bank), the district court dismissed the counts in which the Bank was named for failure to al-

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* The Honorable Luther L. Bohanon, United States District Judge of the Eastern, Northern and Western Districts of Oklahoma, sitting by designation.

[1] The Bank of Nova Scotia was charged in ten counts with conspiracy to defraud the United States (18 U.S.C. § 371) (Count 1) and aiding and abetting a mail fraud (18 U.S.C. §§ 1341, 2) (Counts 13-21).

lege the requisite knowledge and intent by the Bank to commit the crimes charged. *Id.* The Government appealed all these dismissals in Nos. 83-1363 through 83-1369.

Before argument here, as requested we partially remanded the case to the district court to determine whether misconduct on the part of Government attorneys in connection with the grand jury investigation and presentation constituted additional grounds for dismissal. Following the partial remand, Judge Winner issued an opinion which, among other things, summarized the status of the cases which were reassigned to Judge Kane, granted a new trial on the obstruction of justice count against Kilpatrick, and ordered disclosure of the grand jury transcript. *See United States v. Kilpatrick*, 575 F.Supp. 325 (D.Colo.1983).

After ten days of hearings Judge Kane dismissed all twenty-seven counts of the indictment because of prosecutorial misconduct.[2] The Government also appealed these dismissals in Nos. 84-2481 through 84-2487. With the latter appeals we consolidated Nos. 83-1363 through 83-1369, discussed above. In this opinion we dispose of the issues raised in appeals Nos. 83-1363 through 83-1369 and Nos. 84-2481 through 84-2487. Our separate opinion to follow will address the issues raised in No. 83-2284, the Government's appeal from the order for a new trial for Kilpatrick challenging adverse publicity concerning Government counsel, and No. 84-1231, a mandamus proceeding also complaining of adverse publicity concerning Government counsel.

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[2] The district court's first dismissal left standing Count XXVII of the indictment which charged the defendant Kilpatrick with obstructing the grand jury investigation of the tax shelters. After a jury trial the defendant Kilpatrick was found guilty of obstruction of justice. *See United States v. Kilpatrick*, 575 F.Supp. 325, 326 (D.Colo. 1983). However, the defendant Kilpatrick moved for a new trial, which Judge Winner granted. *See id.* at 342.

We conclude that we must reverse the dismissals by the district court and order reinstatement of all counts of the indictment.

I

Sufficiency of the indictment

A

The Government appeals the order dismissing the first twenty-six counts of the twenty-seven count indictment, Nos. 83-1363 through 83-1369. (I R. 274). The indictment was based on two alleged fraudulent investment enterprises sold to investor-taxpayers in the United States. The district court dismissed the first twenty-six counts because of their failure to allege the lack of economic substance in the transactions underlying the tax shelter program, and because of the court's concern that the defendants would not be able to plead a conviction or acquittal as a bar to subsequent prosecution. (IV R. 3-4). Furthermore, the ten counts naming the Bank were dismissed as to the Bank on the additional ground that the indictment failed to allege that the Bank or its representatives had the requisite knowledge or intent to commit the crimes charged. (IV R. 7-11).

Count I, which related to the structured coal programs in the United States, charged five of the individual defendants and the Bank with "unlawfully, willfully, and knowingly conspir[ing] . . . to defraud the United States of America by impeding, impairing, obstructing and defeating the lawful functions of the Internal Revenue Service of the Treasury Department in the ascertainment, computation, assessment and collection of the revenue through false and fictitious claims of deductions for advance royalty 'payments' . . ." in violation of 18 U.S.C. § 371. (I R. 1-2). The crux of the conspiracy charged in Count I was the creation in mineral leases of false tax deductions for nonexistant advance royalty payments for investor-taxpayers. The charging paragraph

of Count I is followed by an extensive listing of "Means And Methods" and sixty-four overt acts.

Count II, which concerned the funding of the research and development of methanol conversion processes, charged five of the individual defendants with a conspiracy similar to the conspiracy alleged in Count I in violation of 18 U.S.C. § 371. The crux of the conspiracy charged in Count II was the creation of false tax deductions on nonexistant research and development payments resulting from investments in limited partnerships formed to fund research and development of methanol conversion processes.

Counts III through X charged various defendants under 26 U.S.C. § 7206(2) with aiding and assisting in the preparation and presentation of false partnership and individual tax returns because of representations made to various taxpayers that the taxpayers were entitled to claim deductions for royalty payments (Counts III through VI), or research and development payments (Counts VII through X), when no such deductions were allegedly permissible. Counts XI and XII charged defendants Kilpatrick and O'Donnell with willfully making and subscribing false individual tax returns in violation of 26 U.S.C. § 7206(1). Counts XIII through XXVI charged various defendants with substantive mail fraud violations under 18 U.S.C. § 1341, based on their alleged defrauding of investors in connection with the programs alleged in Counts I and II.

After extensive briefing and hearings, the district court dismissed Counts I and II. First, the court dismissed the two counts for failure to allege lack of economic substance of the underlying enterprises. Such justification must necessarily rest on the view that such lack of economic substance is an essential element of a § 371 crime in these circumstances. Second, the court dismissed the two counts because of its concern that the

defendants would not be able to plead a bar to any subsequent prosecution. The parties stipulated that the programs which formed the basis of Counts I and II also served as the foundation of the fraud alleged in Counts III through XXVI. (I R. 274-75). The court thus dismissed those counts. (*Id.*) Moreover, the court dismissed as to the Bank, finding that knowledge and intent on the Bank's part was not sufficiently alleged.

B

An indictment is sufficient if it (1) contains the essential elements of the offense intended to be charged, (2) sufficiently apprises the accused of what he must be prepared to defend against, and (3) enables the accused to plead a judgment under the indictment as a bar to any subsequent prosecution for the same offense. *Russell v. United States*, 369 U.S. 749, 763-64, 82 S.Ct. 1038, 1046-47, 8 L.Ed.2d 240 (1962); *see also United States v. Salazar*, 720 F.2d 1482, 1486 (10th Cir. 1983), *cert. denied*, 469 U.S. 1110, 105 S.Ct. 789, 83 L.Ed.2d 783 (1985).

> The test is not whether the indictment could have been made more definite and certain. Rather, before a conviction, the indictment standing alone must contain the elements of the offense intended to be charged and must be sufficient to apprise the accused of the nature of the offense so that he may adequately prepare a defense. And, after a conviction, the entire record of the case must be sufficient so as to enable the accused to subsequently avail himself of the plea of former jeopardy if the need to do so should ever arise.

Clay v. United States, 326 F.2d 196, 198 (10th Cir. 1963), *cert. denied*, 377 U.S. 1000, 84 S.Ct. 1930, 12 L.Ed.2d 1050 (1964) (footnote omitted); *see also* 1 C. Wright, Federal Practice and Procedure § 125, at 364-65 (2d ed. 1982).

We hold that the indictment is sufficiently precise to meet the requirements of the Constitution and Rule 7(c) of the Federal Rules of Criminal Procedure.[3] We agree with the district court that the basis of Counts I and II also served as the foundation of the fraud alleged in Counts III through XXVI. Consideration of the first two counts alone was urged in the briefs submitted. Therefore, we direct our attention primarily to Counts I and II. *Accord United States v. Arge*, 418 F.2d 721, 723 (10th Cir. 1969).

C

Essential elements of the offense charged

The court should dismiss an indictment if it does not "contain[] the elements of the offense intended to be charged." *Russell*, 369 U.S. at 763, 82 S.Ct. at 1047. All the defendants contend, and the district court agreed, that the failure to allege the lack of economic substance of the underlying programs rendered the indictment fatally defective. We disagree.

Count I charges all the individual defendants and the Bank with defrauding the United States of America "through false and ficticious claims of deductions for advance royalty 'payments'. . . ." (I R. 2). We believe the allegation in Count I of "false and ficticious claims of deductions" is sufficient when read in light of the entire Count. It is true that indictments under the broad language of the general conspiracy statute "must be scrutinized carefully as to each of the charged defendants

[3] The Sixth Amendment provides in part that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; . . . ." (Rule 7(c)(1) provides in part:

> The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged.

"because of the possibility, inherent in a criminal conspiracy charge, that its wide net may ensnare the innocent as well as the culpable." *Dennis v. United States*, 384 U.S. 855, 860, 86 S.Ct. 1840, 1843, 16 L.Ed.2d 973 (1966) (citations omitted). However the indictment should be read as a whole and interpreted in a commonsense manner. *See United States v. Hajecate*, 683 F.2d 894, 898 (5th Cir. 1982), *cert. denied*, 461 U.S. 927, 103 S.Ct. 2086, 77 L.Ed.2d 298 (1983); *see also* 8 J. Moore, Moore's Federal Practice ¶ 7.04, at 7-20 (2d ed. 1985). Count I charges that five of the individual defendants and the Bank conspired to defraud the United States (unlawful objective) by false and ficticious claims of deductions (the means). *Accord Schino v. United States*, 209 F.2d 67, 69 (9th Cir. 1953), *cert. denied*, 347 U.S. 937, 74 S.Ct. 627, 98 L.Ed. 1087 (1954).

Count II charges five of the individual defendants with the same conspiracy but as to research and development payments. It states the gist of the offense of conspiracy and adequately lays out the grand jury's charges and the general factual circumstances underlying them. The fact that the defendants contest the substance of the offense charged does not render the indictment insufficient. *See United States v. Crooks*, 804 F.2d 1441, 1450 (9th Cir. 1986). We do not feel that a lack of economic substance allegation is required in an indictment already alleging that the defendants conspired to defraud the United States through *false* and *ficticious* claims of deductions for research and development payments.[4]

[4] The defendants cite a number of cases which consider the economic substance of a given transaction to be pivotal to the outcome of the case. *E.g.*, *Frank Lyon Co. v. United States*, 435 U.S. 561, 573, 577, 98 S.Ct. 1291, 1298, 1300, 55 L.Ed.2d 550 (1978); *see also United States v. Mallas*, 762 F.2d 361, 363 (4th Cir. 1985); *United States v. Carruth*, 699 F.2d 1017, 1021-22 (9th Cir. 1983), *cert. denied*, 464 U.S. 1038, 104 S.Ct. 698, 79 L.Ed.2d 164 (1984); *United States v. Ingredient Technology Corp.*, 698 F.2d 88, 89, 94 (2d Cir.), *cert. denied*, 462 U.S. 1131, 103 S.Ct. 3111, 77 L.Ed.2d 1366

The Bank further contends that Count I fails to allege the requisite knowledge and intent on its part, which it says is necessary to state an offense under 18 U.S.C. § 371. It points to "key charging" paragraphs which list various individual defendants, but which do not name the Bank.

It is axiomatic that "all the material facts and circumstances embraced in the definition of the offence must be stated, or the indictment will be defective." *United States v. Hess*, 124 U.S. 483, 486, 8 S.Ct. 571, 573, 31 L.Ed 516 (1888). Moreover, a court cannot by implication add an essential element to the indictment. "[A defendant] cannot be convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury." *United States v. Keith*, 605 F.2d 462, 464 (9th Cir. 1979) (citations omitted). Courts, however, do not insist that any particular word or phrase be used in stating an essential element. *See United States v. Garcia-Geronimo*, 663 F.2d 738, 742 (7th Cir. 1981). The requisite mental element for a § 371 offense must be alleged in the indictment. *See United States v. Stevens*, 612 F.2d 1226, 1230 (10th Cir. 1979), *cert. denied*, 447 U.S. 921, 100 S.Ct. 3011, 65 L.Ed.2d 1113 (1980).

(1983). They do not, however, address the sufficiency of an indictment, nor do they provide principles helpful here. The sufficiency of an indictment on a motion to dismiss is tested by its allegations. Fed. R. Crim. P. 12(b)(2). The points defendants argue are to be tested at trial. *See United States v. Knox*, 396 U.S. 77, 83 n.7, 90 S.Ct. 363, 367 n.7, 24 L.Ed.2d 275 (1969); *cf. Crooks*, 804 F.2d at 1448.

We do not feel that the holdings in *Frank Lyon* or the other cases show a fatal defect in the indictment here for want of an allegation of lack of economic substance to the underlying transactions. The indictment *does* charge a lack of resources to make payments and loans, fictitious transactions, and check kites and check swaps used therefor, in the Count I and II statements of "Means and Methods." The indictment is thus sufficient as a statement of the offenses charged.

The charging paragraph in Count I uses the phrase "unlawfully, willfully, and knowingly conspire . . . to defraud the United States of America . . . in the ascertainment, computation, assessment and collection of the revenue. . . ." (I R. 1-2). Moreover, the allegations in Count I go further to charge the requisite knowledge and intent. Under the "Means and Method" portion of Count I the indictment alleges that the Bank, along with other named defendants, "devised and/or participated in a scheme to make it appear that the required payments had, in fact, been made. . . " (*Id.* at 6). It is further charged that the Bank "agreed to further conceal the fact that the purported payments by P & J Coal Company could not be made and that the basis of the 1978 funding was nothing more than a 'check kite' and/or 'check swap.'" (*Id.* at 7). It is further charged that the Bank "knew that this type of 'check kite' was ficticious, and was conducted to create checks to make it appear that P & J Coal Company had made its required loans." (*Id.* at 8). It is also alleged that the Bank "knew that P & J Coal Company had not in actuality made its payments as required and that the transaction was a fiction designed to create the illusion that P & J Coal Company had made payments to investors. . . ." (*Id.* at 9). Furthermore, it is stated that the Bank conspired with the named defendants to have "the records of and pertaining to Marlborough Investments, Ltd., as well as other entities, . . . moved, altered and/or destroyed." (*Id.*).

Both the initial charging paragraph and the several "Means and Methods" paragraphs aver the requisite knowledge or intent on the part of the Bank. Whether the exact term used is "knowledge" or "devised" or "agreed to conceal" is not relevant; "[t]here is no magic to the words used . . . to allege guilty knowledge." *Davis v. United States*, 347 F.2d 378, 379 (10th Cir. 1965) (per curiam). Moreover, "[w]hen the same mental element is required for each act . . . an initial recital of

the element is sufficient." *Stevens*, 612 F.2d at 1230. Count I depicts the Bank as an active participant in a conspiracy to defraud the IRS in its assessment and collection of income taxes. The essence of Count I is the alleged concerted conduct on the part of all the defendants. Thus Count I adequately charges a conspiracy to defraud the United States, and with the required specificity alleges the culpable role of each of the defendants. *Dennis*, 384 U.S. at 860, 86 S.Ct. at 1843; *see also United States v. Turkish*, 623 F.2d 769, 771 (2nd Cir. 1980), *cert. denied*, 449 U.S. 1077, 101 S.Ct. 856, 66 L.Ed.2d 800 (1981). And we conclude that the indictment sufficiently charged the requisite mental element on the part of the Bank.[5]

D

Notice of the charges

We must decide next whether the indictment was adequate to inform the defendants of the charges.

Allegations of the means and methods as well as the overt acts may be considered in judging the sufficiency of the conspiracy counts. *See United States v. Watson*, 594 F.2d 1330, 1341 (10th Cir.), *cert. denied*, 444 U.S. 840, 100 S.Ct. 78, 62 L.Ed.2d 51 (1979). Counts I and II set out the transactions purporting to be the grava-

[5] The Bank cites as supplemental authority *United States v. Golitschek*, 808 F.2d 195 (2d Cir. 1986), for the proposition that the omission of the Bank from the indictment's list of defendants with specific knowledge of the alleged violations of tax laws is fatal. *Golitschek* does not address the sufficiency of an indictment; rather, that case reviews the propriety of certain jury instructions concerning the defendant's knowledge as to the legality of planned shipments of helicopters from the United States to Iran. *Id.* at 197.

Moreover, in focusing exclusively on the omission the Bank fails to recognize one of the fundamental canons of construction in interpreting an indictment; that is, an indictment must be read as a whole and interpreted in a common-sense manner. Employing this canon, we are convinced that the indictment sufficiently charged the requisite mental element on the part of the Bank.

men of the conspiracy charges with specificity. Relevant names, dates, companies involved, and amounts of money are averred in detail. An extensive listing of "Means and Methods" and "Overt Acts" is made. Thus the indictment is replete with the particulars of the acts on which the two counts are predicated. It adequately charges the individual defendants and the Bank with definiteness, certainty, and with reasonable particularity as to time and place, naming persons or entities involved in the conspiracies. *See, e.g., Wong Tai v. United States*, 273 U.S. 77, 81, 47 S.Ct. 300, 301, 71 L.Ed. 545 (1927).

E

Preclusion of double jeopardy

Finally we must consider whether the indictment is sufficient to adequately protect the defendants against double jeopardy.

In addressing this question we note that the defendants are permitted to use the entire record and the judgment, not merely the indictment, in asserting double jeopardy. *See Arge*, 418 F.2d at 725; *Clay*, 326 F.2d at 199; *see also* 1 C. Wright, *supra* at § 125, p. 365. We are not persuaded that the indictment fails to adequately protect the defendants. It lays out the necessary facts with specificity as to the relevant times, places, persons, and entities and the charges made against each defendant. Along with the entire record in this case, the indictment will provide adequate safeguards against double jeopardy.

II

Prosecutorial misconduct

A

The Fifth Amendment provides that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment

of a Grand Jury. . . ." The grand jury is a "grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety. . . ." *Blair v. United States*, 250 U.S. 273, 282, 39 S.Ct. 468, 471, 63 L.Ed. 979 (1919). The function of the grand jury "was not only to examine into the commission of crimes, but to stand between the prosecutor and the accused, and to determine whether the charge was founded upon credible testimony or was dictated by malice or personal ill will." *Hale v. Henkel*, 201 U.S. 43, 59, 26 S.Ct. 370, 373, 50 L.Ed. 652 (1906). A grand jury proceeding is not adversarial but *ex parte*. *See United States v. Calandra*, 414 U.S. 338, 343-44, 94 S.Ct. 613, 617-18, 38 L.Ed.2d 561 (1974). We are mindful of the oft-quoted words of Judge Learned Hand that "[s]ave for torture, it would be hard to find a more effective tool of tyranny than the power of unlimited and unchecked *ex parte* examination." *United States v. Remington*, 208 F.2d 567, 573 (2d Cir. 1953) (L. Hand, J., dissenting), *cert. denied*, 347 U.S. 913, 74 S.Ct. 476, 98 L.Ed. 1069 (1954).

The separation of powers doctrine mandates judicial respect for the independence of both the prosecutor and the grand jury. *See United States v. De Rosa*, 783 F.2d 1401, 1404 (9th Cir.), *cert. denied*, —— U.S. ——, 106 S.Ct. 3282, 91 L.Ed.2d 571 (1986); *United States v. McClintock*, 748 F.2d 1278, 1283 (9th Cir. 1984), *cert. denied*, —— U.S. ——, 106 S.Ct. 75, 88 L.Ed.2d 61 (1985). Dismissals of indictments for prosecutorial misconduct are rarely upheld. *United States v. Anderson*, 778 F.2d 602, 606 (10th Cir. 1985); *United States v. Pino*, 708 F.2d 523, 530 (10th Cir. 1983); *see also United States v. Buchanan*, 787 F.2d 477, 487 (10th Cir. 1986). Dismissal of an indictment for prosecutorial misconduct rests upon two distinct though closely related theories. A court may dismiss on the bases of the Fifth Amend-

ment Due Process or Grand Jury Clauses.[6] The constitutional concerns focus on the fairness to the defendant and on remedying any harm to his basic rights. *See McClintock*, 748 F.2d at 1284; *Pino*, 708 F.2d at 530-31.

A court may also dismiss an indictment by relying on its supervisory powers. *See Pino*, 708 F.2d at 530. The supervisory powers theory is premised on the federal courts' inherent ability to "formulate procedural rules not specifically required by the Constitution or the Congress." *United States v. Hasting*, 461 U.S. 499, 505, 103 S.Ct. 1974, 1978, 76 L.Ed.2d 96 (1983). The supervisory powers theory focuses on deterring illegality and protecting judicial integrity. *See McClintock*, 748 F.2d at 1285 (citing *United States v. Payner*, 447 U.S. 727, 735 n. 8, 100 S.Ct. 2439, 2446, n. 8, 65 L.Ed.2d 468 (1980)). However, the common theme of the cases is that prosecutorial misconduct alone is not a valid reason to dismiss an indictment. "An indictment may be dismissed for prosecutorial misconduct which is flagrant to the point that there is *some significant infringement on the grand jury's ability to exercise independent judgment.*" *Pino*, 708 F.2d at 530 (emphasis added); *see also United States v. Page*, 808 F.2d 723, 726-27 (10th Cir. 1987).

Since briefing and argument we now have the Supreme Court's opinion in *United States v. Mechanik*, 475 U.S. 66, 106 S.Ct. 938, 89 L.Ed.2d 50 (1986), for which we abated these appeals, and supplemental briefs thereon and our opinion in *United States v. Taylor*, 798 F.2d 1337 (10th Cir. 1986). In *Mechanik*, the defend-

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[6] We have pointed out that dismissal has been based on the Fifth Amendment Due Process Clause or on the court's supervisory power. *Pino*, 708 F.2d at 530, and cases there cited. The Ninth Circuit has cited the Grand Jury Clause as a constitutional ground for dismissal. *See United States v. Sears, Roebuck and Co.*, 719 F.2d 1386, 1391 n.7 (9th Cir. 1983), *cert. denied*, 465 U.S. 1079, 104 S.Ct. 1441, 79 L.Ed.2d 762 (1984).

ants moved before the verdict for dismissal of the indictment on the ground that the simultaneous presence and examination of two Government agents had violated Fed.R.Crim.P. 6(d) (*i.e.*, unauthorized presence before the grand jury). 475 U.S. at ——, 106 S.Ct. at 940. The district judge took the motion under advisement until the conclusion of the trial, when he denied it. *Id.* at ——-——, 106 S.Ct. at 940-42. The Fourth Circuit reversed in part, dismissing one count of the indictment using a *per se* dismissal rule. The Supreme Court reversed in part, holding that "[m]easured by the petit jury's verdict, then, any error in the grand jury proceeding connected with the charging decision was harmless beyond a reasonable doubt." *Id.* at ——, 106 S.Ct. at 942 (footnote omitted). Moreover, the Court held:

> [H]owever diligent the defendants may have been in seeking to discover the basis for the claimed violation of Rule 6(d), the petit jury's verdict rendered harmless any conceivable error in the charging decision that might have flowed from the violation. In such a case, the societal costs of retrial after a jury verdict of guilty are far too substantial to justify setting aside the verdict simply because of an error in the earlier grand jury proceedings.

Id. at ——, 106 S.Ct. at 943.

In *Taylor* we distinguished between technical errors like those addressed in *Mechanik* and errors which adversely threaten a defendant's right to fundamental fairness in the criminal process. The former category of error falls within the rule announced in *Mechanik*, while the later category of error is not rendered moot by a petit jury's determination of guilt. *See Taylor*, 798 F.2d at 1340.

In light of *Mechanik* and the analysis in our *Taylor* and *Pino* opinions, we conclude that consideration of dismissal of an indictment because of prosecutorial misconduct before a grand jury calls for weighing several factors. First, a reviewing court must determine whether the claimed errors should be characterized as technical or procedural and affecting only the probable cause charging decision by the grand jury, or whether the alleged errors should be characterized as threatening the defendant's right to fundamental fairness in the criminal process. If the errors can be characterized as procedural violations affecting only the probable cause charging decision by the grand jury, then the defendant must have successfully challenged the indictment before the petit jury rendered a guilty verdict. *Mechanik*, 475 U.S. at ——-——, 106 S.Ct. at 941-43. If, however, the errors can be characterized as threatening the defendant's rights to fundamental fairness as "go[ing] beyond the question of whether the grand jury had sufficient evidence upon which to return an indictment, . . . ," a determination of guilt by a petit jury will not moot the issue. *Taylor*, 798 F.2d at 1340.

Second, it must be determined whether the prosecutor engaged in flagrant or egregious misconduct which significantly infringed on the grand jury's ability to exercise independent judgment. *Pino*, 708 F.2d at 530. Thus even assuming misconduct, a failure by the defendant to show a significant infringement on the ability of the grand jury to exercise its independent judgment in the charging decision will result in the denial of a motion to dismiss. "The relevant inquiry focuses on the impact of the prosecutor's misconduct on the grand jury's impartiality, not on the degree of the prosecutor's culpability." *De Rosa*, 783 F.2d at 1405 (citation omitted).[7]

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[7] The first consideration is necessitated by the Supreme Court's opinions in *Mechanik*, 475 U.S. 66, 106 S.Ct. 938, 89 L.Ed.2d 50 (1986) and *United States v. Hasting*, 461 U.S. 499, 103 S.Ct. 1974, 76 L.Ed.2d 96 (1983). The second and third factors are proper because of the concerns highlighted in *Costello v. United States*, 350 U.S. 359, 76 S.Ct. 406, 100 L.Ed. 397 (1956), where the Court held that "[a]n indictment returned by a legally constituted and unbiased grand jury, like an information drawn by

Here the district court dismissed the indictment as a whole, stating that the indictment was dismissed for numerous violations of Rule 6(d); that the indictment was dismissed because of numerous violations of Rule 6(e); that the indictment was *not* dismissed *solely* for use of "pocket immunity" in contravention of 18 U.S.C. §§ 6002 and 6003; that the indictment was *not* dismissed *solely* for violations of the Fifth Amendment; that the indictment was *not* dismissed *solely* for the knowing and deliberate presentation of misinformation to the grand jury; that the indictment was *not* dismissed *solely* for violations of the Sixth Amendment; and that the indictment was dismissed because of the totality of the circumstances, including the numerous violations of Rule 6(d) and (e), the violations of 18 U.S.C. §§ 6002 and 6003, the violations of the Fifth and Sixth Amendments, the knowing presentation of misinformation to the grand jury, and the mistreatment of witnesses. 594 F.Supp. at 1353.

In its separate dismissal for violations of Rule 6, the district court employed a *per se* rule of dismissal. However, in dismissing the indictment under the totality test, the court employed the standard explicated in *Pino*, 708 F.2d at 530. The Government contends that the district court's factual findings as well as the legal conclusions drawn were in error. Moreover, the Government alleges that the indictment was the product of an independent grand jury and thus valid. We agree substantially with the Government's argument and therefore must reverse.

B

The defendants-appellees vigorously argue that the appropriate standard of review for the district court's findings is the clearly erroneous standard, under which they contend that reversal is not warranted. Our review of

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the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits. The Fifth Amendment requires nothing more." *Id.* at 363, 76 S.Ct. at 409 (footnote omitted).

whether the prosecutors engaged in specific flagrant or egregious misconduct before the grand jury involves questions of historical fact governed by the clearly erroneous standard. *Campbell v. United States*, 373 U.S. 487, 493, 83 S.Ct. 1356, 1360, 10 L.Ed.2d 501 (1963); *cf. Anderson v. Bessemer City*, 470 U.S. 564, 573, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985). Of course, such findings of historical fact are clearly erroneous only when "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Anderson v. Bessemer City*, 470 U.S. at 573, 105 S.Ct. at 1511 (1985).

Here, however, the facts are essentially admitted or specifically found by the district court and the law is undisputed. In such instances the issue is whether the law applied to the facts satisfies the legal standard of conduct binding on the prosecutor. Although the question can be viewed as one going to an ultimate fact, *i.e.*, whether the independent judgment of the grand jury has been infringed, we nevertheless conclude that the issue primarily involves the consideration of legal principles, calling for *de novo* review by the appellate court. *See Supre v. Ricketts*, 792 F.2d 958, 961 (10th Cir. 1986); *cf. Chaney v. Brown*, 730 F.2d 1334, 1346 (10th Cir. 1984), *cert. denied*, 469 U.S. 1090, 105 S.Ct. 601, 83 L.Ed.2d 710 (1984) (holding that the issue whether withheld evidence might have affected guilt or punishment determination so that due process was denied is open for federal court review despite presumption of correctness of state court findings).

Accordingly, as to the trial court's critical rulings that the misconduct found tainted the grand jury indictment with its illegality, *see, e.g.*, 594 F.Supp. at 1349, that the abuses constituted systematic and pervasive overreaching, that the grand jury "was usurped and that time-honored constitutional principles were sullied," 594

F.Supp. at 1352, we review the rulings *de novo*, while we accept the underlying findings of historical fact, with some exceptions noted in this opinion. *See De Rosa*, 783 F.2d at 1404 ("We review *de novo* a district court's determination of whether a prosecutor's alleged misconduct before a grand jury warrants dismissal of the indictment.").

C

Rule 6(d) violations by unauthorized presence before the grand jury

The district court found that "the [IRS] agents made many joint appearances before the grand jury, without the presence of government counsel, and read transcripts to the jurors." 594 F.Supp. at 1330 (citations to record omitted). Finding the tandem reading of transcripts of proceedings before the first grand jury by the IRS agents to the second grand jury violative of Fed.R.Crim.P. 6(d), the district court found these violations to be one independent ground for dismissal of the indictment. 594 F.Supp. at 1344.

Rule 6(d) provides:

> Who May Be Present. Attorneys for the government, the witness under examination, interpreters when needed and, for the purpose of taking the evidence, a stenographer or operator of a recording device may be present while the grand jury is in session, but no person other than the jurors may be present while the grand jury is deliberating or voting.

We agree there was a violation of the rule. The record clearly shows that on several occasions IRS agents appeared before the grand jury jointly reading transcripts. (XIX R. 482-85; XX R. 633-34, 692-93, 709-11). The record also shows that the prosecutors at times

would leave the proceedings, allowing the agents to continue reading.[8]

Nevertheless, we disagree with the dismissal. We believe that *Mechanik*, which the district judge did not have before him, forecloses the use of a *per se* dismissal rule for violations of Rule 6:

> We cannot accept the Court of Appeals' view that a violation of Rule 6(d) requires automatic reversal of a subsequent conviction regardless of the lack of prejudice. Federal Rule of Criminal Procedure 52 (a) provides that errors not affecting substantial rights shall be disregarded. We see no reason not to apply this provision to 'errors, defects, irregularities or variances' occurring before a grand jury as we have applied it to such error occurring in the criminal trial itself. *See United States v. Hasting*, 461 U.S. 499, 509 [103 S.Ct. 1974, 1981, 76 L.Ed.2d 96] (1983); *Chapman v. California*, 386 U.S. 18, 21-24 [87 S.Ct. 824, 826-828, 17 L.Ed.2d 705] (1967); *United States v. Lane*, 474 U.S. 438, 106 S.Ct. 725, 88 L.Ed.2d 814 (1986)].

Mechanik, 475 U.S. at ——, 106 S.Ct. at 942.[9]

While here the violations were called to the attention of the court before trial so that we do not have a verdict

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[8] The record further shows that one or possibly two of the agents were not placed under oath before reading the transcripts. (XIX R. 486-90; XX R. 709-11). Nevertheless, we do not believe the clarification of this issue is necessary to the resolution of this case.

[9] The defendants point out in their supplemental briefs that the Court in *Mechanik* expressed "no opinion as to what remedy may be appropriate for a violation of Rule 6(d) *that has affected the grand jury's charging decision* and is brought to the attention of the trial court before the commencement of trial." *Mechanik*, 475 U.S. at ——, 106 S.Ct. at 943 (emphasis added) (footnote omitted). We feel that this language did leave open a determination whether dismissal for such a violation, timely raised, may be justified if prejudice is shown affecting the charging decision.

of guilty to serve as a basis for holding that no prejudice in the charging decision occurred, we nevertheless are convinced that a *per se* rule of dismissal for Rule 6(d) violations as earlier applied in *United States v. Pignatiello*, 582 F.Supp. 251, 254-55 (D.Colo. 1984) (and cases cited therein), is no longer proper since *Mechanik*. We find no other circumstances showing that the violation of the Rule resulted in prejudice or infringement on the grand jury's independent functioning, as discussed below. Thus the dismissal for violations of Rule 6(d) without more cannot stand.

D

Rule 6(e) violations

The district court also found that the Government attorneys violated Fed.R.Crim.P. 6(e) by improperly disclosing and using grand jury materials, and by violating the rules of secrecy applicable to grand jurors, interpreters, stenographers, recording device operators, typists, Government attorneys, and persons to whom disclosure is made under Rule 6(e)(3)(A)(ii). 594 F.Supp. at 1331. The court held:

> [W]here violations of Rule 6(e) are intentional or reckless and systematic, the sanction of contempt is insufficient and dismissal of the indictment is warranted. Under such circumstances, it is not necessary for the defendant to show that he has been prejudiced by the violations. *In the instant case, however, such showing of prejudice has been convincingly made.*

Id. at 1348 (emphasis added).

Rule 6(e) implements the traditional policy of cloaking grand jury proceedings. *See United States v. Sells Engineering, Inc.*, 463 U.S. 418, 425, 103 S.Ct. 3133, 3138, 77 L.Ed.2d 743 (1983). The Supreme Court noted several reasons for the policy of secrecy:

> First, if preindictment proceedings are made public, many prospective witnesses would be hesitant to come forward voluntarily, knowing that those against whom they testify would be aware of that testimony. Moreover, witnesses who appeared before the grand jury would be less likely to testify fully and frankly, as they would be open to retribution as well as to inducements. There also would be the risk that those about to be indicted would flee, or would try to influence individual grand jurors to vote against indictment. Finally, by preserving the secrecy of the proceedings, we assure that persons who are accused but exonerated by the grand jury will not be held up to public ridicule.

Douglas Oil Co. of California v. Petrol Stops Northwest, 441 U.S. 211, 219, 99 S.Ct. 1667, 1673, 60 L.Ed.2d 156 (1979) (footnote omitted). Rule 6(e) operates as the measure of the privilege of access to grand jury materials.

The Government contends that dismissal of an indictment is not an appropriate remedy for a Rule 6(e) violation. In so arguing, the Government relies on the maxim "*expressio unius est exclusio alterius.*" The Rule provides "[a] knowing violation of Rule 6 may be punished as a contempt of court." Fed.R.Crim.P. 6(e)(2). The contempt language is permissive only. In the usual case Rule 6(e) can be enforced by a contempt citation. *See United States v. Malatesta*, 583 F.2d 748, 753 (5th Cir. 1978), *modified on other grounds*, 590 F.2d 1379 (5th Cir.) (en banc), *cert. denied*, 444 U.S. 846, 100 S.Ct. 91, 62 L.Ed.2d 59 (1979). Nevertheless, violations of Rule 6(e) may justify dismissal of the indictment where there has been an abuse of the grand jury process. *See United States v. Kabbaby*, 672 F.2d 857, 863 (11th Cir. 1982) (per curiam); *Malatesta*, 583 F.2d at 753. However, the focus of our inquiry must be on the integrity of the grand jury's process and independence,

rather than on the propriety of the Government's conduct. *See Kabbaby*, 672 F.2d at 863; *United States v. Phillips*, 664 F.2d 971 (5th Cir. 1981), *cert. denied*, 457 U.S. 1136, 102 S.Ct. 2965, 73 L.Ed.2d 1354 (1982).

Here the district court found reckless and systematic violations of Rule 6(e). Insofar as the court's opinion relied on such Rule 6(e) violations as a *per se* ground of dismissal, we again disagree. We hold that dismissal cannot be premised on such Rule 6(e) violations, *ipso facto*.

The court did find in addition that the violations caused prejudice, and we will treat that point in discussing the dismissal based on the totality of the circumstances.

E

The totality of misconduct before the grand jury

The district court concluded its opinion by stating:

> The indictment is dismissed because of the totality of the circumstances which include numerous violations of Rule 6(d) and (e), Fed.R.Crim.P., violations of 18 U.S.C. §§ 6002 and 6003, violations of the Fifth and Sixth Amendments to the United States Constitution, knowing presentation of misinformation to the grand jury and mistreatment of witnesses.

594 F.Supp. at 1353. The court employed the totality of the circumstances test of *Pino*, 708 F.2d at 530, to dismiss all twenty-seven counts of the indictment. The dismissal was premised on findings that Rule 6(d) and (e) were systematically violated; that IRS agents were sworn as "agents of the grand jury;" that summaries of evidence were misleading; that granting informal immunity was improper; that calling seven witnesses to appear solely to assert their Fifth Amendment privilege was improper; that a grand jury witness was mistreated; and that there were post-indictment violations of *Massiah v. United States*, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1064).[10]

We first consider whether the defendants challenged the indictment before the petit jury rendered a guilty verdict. It appears that all the named defendants successfully moved to dismiss the first twenty-six counts of the indictment before the commencement of the trial. The defendant Kilpatrick successfully moved to dismiss the twenty-seventh count (obstruction of justice) after the petit jury had rendered a guilty verdict. However, the district judge granted his motion for a new trial. Therefore, we will treat the defendant Kilpatrick's claim as to the twenty-seventh count along with that of the other defendants.[11] Thus we need not decide which errors affected only the probable cause determination of the grand jury and which errors implicated the defendants' rights to fundamental fairness. The rationale for foreclosing review recited in *Mechanik* is not applicable with respect to this issue.

We are not persuaded by the several reasons given for the dismissal. First, summaries of evidence given before

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[10] The district judge noted that the *Massiah* violations by definition occurred after the indictment was returned, and that defendants have demonstrated no prejudice from these violations; that the Bank's counsel had performed "ably and adequately throughout the litigation." He therefore concluded that dismissal of the indictment was an inappropriate remedy for the *Massiah* violations. 594 F.Supp. at 1351. Nevertheless the judge also said that the "*Massiah* violations must enter into my general qualitative assessments of the prosecutor's and grand jury's conduct." *Id.* He thus apparently weighed these violations as one element of the totality of the circumstances—one ground for dismissal of the indictment.

[11] We do not hold that every defendant can attack an indictment alleging errors affecting only the probable cause determination by the grand jury after they successfully move for a new trial. That issue is not now before us. However, the peculiar facts of this case permit us to consider Kilpatrick's claims without prejudice to any party.

the grand jury are permissible and often helpful, especially in complicated cases such as this. It must be remembered that this complicated tax fraud case spanned twenty months and involved two grand juries. Moreover, the district court is prohibited from looking behind the indictment to determine if it was based on inadequate or incompetent evidence. *Costello*, 350 U.S. at 363, 76 S.Ct. at 408; *see also United States v. Kysar*, 459 F.2d 422, 424 (10th Cir. 1972).[12] We cannot in these proceedings go into trial of the general issue, the insufficiency of proof, or the errors in the evidence before the grand jury.

Second, we have held that the use of "informal immunity," [13] which has been frequently upheld, is entirely proper. *See United States v. Anderson*, 778 F.2d 602, 606 (10th Cir. 1985) (and cases cited therein). Moreover, the defendants have failed to show how the use of informal immunity prejudiced the grand jury. *See, e.g., id.* at 606.

Third, the district court's findings of post-indictment violations of *Massiah* could not possibly have affected the grand jury's charging decision. Thus the use of such violations to justify dismissal was incorrect.

The remaining findings have somewhat more force but are insufficient to warrant dismissal of the indictment. The district court found systematic violations of Rule 6(d), causing prejudice to the defendants. 594 F.Supp. at 1353. After review of the district court opinions, the records of the hearings, and the grand jury proceedings,

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[12] We note that no claim was made nor did the court find that the Government attorneys used perjured testimony, knowingly, or unknowingly, before the grand jury.

[13] "Informal immunity is contrasted with 'statutory immunity,' which by statute requires the approval of a Senior Justice Department Official and of the district court judge. *See* 18 U.S.C. §§ 6002, 6003." *United States v. Anderson*, 778 F.2d 602, 606 n.2 (10th Cir. 1985).

we are not persuaded that the defendants were prejudiced by the readings of prior grand jury testimony by IRS agents to the subsequent grand jury. We do not condone unsupervised readings by IRS agents unattended by Government attorneys; however, we are unable to find any evidence in the record of infringement on the grand jury's ability to exercise its independent judgment.[14]

The district court further found systematic violations of Rule 6(e). The court found that the Government attorneys "relinquished to the IRS their responsibility to determine the persons to whom disclosure would be made." 594 F.Supp. at 1345. The court also found that the IRS agents manipulated the grand jury to obtain materials to be used for civil litigation. *Id.* We do not find support for these findings.

The district court points to the extensive disclosure of grand jury materials to IRS civil employees as well as the haphazard and *post hoc* method of identifying those to whom disclosure was made as probative of Rule 6(e) violations. 594 F.Supp. at 1343-44. The court also cites as grounds for dismissal the "serious possibility" that IRS representatives improperly manipulated the grand jury to obtain materials for civil litigation purposes; the judge later found that the record "confirms that the grand jury's extraordinary powers and resources were, in part, initiated and channeled for just such a purpose." *Id.* at 1332 (footnote omitted). The court found also that the prosecutors showed a disregard for the secrecy provisions of Rule 6(e); that grand jury information had been disclosed in violation of Rule 6(e); and that a prosecutor had improper motives when he imposed unauthorized secrecy obligations on grand jury witnesses.

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[14] We are unable to find an instance in the record which the IRS agents convened the grand jury sessions without Government attorneys being present. Thus, the district court's findings that the IRS agents may have convened the grand jury sessions is not supported by the record.

Rule 6(e)(3)(A)(ii) permits the Government attorney to make disclosure, without court order, of matters occurring before the grand jury to "such government personnel . . . as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law." Fed.R.Crim.P. 6(e)(3)(A)(ii). The defendants point to portions of the record showing that disclosure of grand jury information was made to unknown numbers of civil IRS personnel who indexed all the subpoenaed grand jury documents. The computer indexing was done at Lowry Air Force Base in Colorado, in Ogden, Utah, and in Dallas, Texas. As to the latter two sites, there were no employees shown on the Rule 6(e) disclosure list. Assuming that this allegation finds support in the record, we fail to see how the grand jury's independence was usurped in such a significant way as to amount to grand jury abuse. *See Pino*, 708 F.2d at 530.

Further, we do not see how the preparation of a catch-all disclosure list significantly infringed the grand jury's independence. We note that the investigation lasted twenty months and involved the efforts of two grand juries. Moreover, the grand juries were presented with a complex tax fraud case. The aid of IRS experts was essential to a complete understanding of the case. The fact that some of the IRS personnel assigned to the grand jury investigation were from the civil division is by itself not sufficient to show grand jury abuse. There is nothing in Rule 6 to keep the Department of Justice from having IRS civil agents assigned to a grand jury investigation. *See Sells Engineering*, 463 U.S. at 428, 103 S.Ct. at 3140; *see also Coson v. United States*, 533 F.2d 1119, 1121 (9th Cir. 1976) (per curiam).

Federal employees assisting the prosecutor in the investigation and prosecution of federal criminal violations are permitted access to grand jury materials without

prior court permission. However, such support personnel may not use the materials except for purposes of assisting Government attorneys to enforce federal criminal laws. *Sells Engineering*, 463 U.S. at 428, 442, 103 S.Ct. at 3140, 3147; *see also* 8 J. Moore, *supra* at ¶ 6.05.[4][a], at 6-119.[15] The Rule 6(e) proscription is on the use of the grand jury material and not on who obtains it. *Sells Engineering*, 463 U.S. at 428, 103 S.Ct. at 3140; *see United States v. Baggot*, 463 U.S. 476, 480, 103 S.Ct. 3164, 3167, 77 L.Ed.2d 785 (1983). Furthermore, the fact that the grand jury returned an extensive indictment is probative evidence that it was not abused to obtain evidence for civil purposes.[16]

The court further found that fifteen letters prepared by the Government and mailed to the defendants' business associates identifying the subject and the targets of the investigation violated the secrecy obligations of Rule 6(e) and should lead to dismissal of the indictment. 594 F.Supp. at 1334-35. We fail to see how such a violation of Rule 6(e) should result in dismissal of the indictment. There is no support for a finding that the grand jury's independent judgment was infringed in any significant way. Moreover, the investigation by the IRS agents of numerous investors in the transactions in question here was proper even though the IRS agents limited the scope of the interviews by revealing the subject mat-

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[15] *United States v. Doe*, —— U.S. ——, ——, ——, 107 S.Ct. 1656, 1659, 1663, 95 L.Ed.2d 94 (1987), illustrates permissible limited use, on a showing of particularized need, by disclosure to Government civil attorneys in the Department of Justice Civil Division and a United States Attorney's Office, of grand jury material for purposes of consultation in deciding whether civil actions should be initiated.

[16] Whether grand jury records can be used as evidence in future civil litigation can be properly decided on a timely motion to suppress in such a case. *See Witte v. United States (In re Grand Jury Subpoena of Fred R. Witte Center Glass No. 3)*, 544 F.2d 1026, 1029 (9th Cir. 1976).

ter of the inquiry. Any misconduct was not so flagrant that the grand jury's independence was infringed.

Finally, we agree with the district court's finding that the prosecutor imposed unauthorized secrecy obligations on two witnesses before the grand jury. *Id.* at 1335-36. Although the admonition to the witnesses was contrary to the dictates of Rule 6(e)(2), no prejudice was shown in connection with the admonition, *see United States v. Radetsky*, 535 F.2d 556, 569 (10th Cir.), *cert. denied*, 429 U.S. 820, 97 S.Ct. 68, 50 L.Ed.2d 81 (1976), and the admonition cannot serve as a basis for dismissal of the indictment.

The district court found that the use of the title "agents of the grand jury" by IRS agents mislead the grand jury.[17] However, "Fed.R.Crim.P. 6 contemplates the use of government agents, such I.R.S. agents, to assist an attorney for the government in his handling of a grand jury investigation." *Anderson*, 778 F.2d at 605. We need not decide here whether the use of "grand jury agents" violated the Rule 6 prohibition against unauthorized presence or unauthorized disclosure.[18] There is no showing by the defendants as to how this record reveals

[17] At the beginning of work of the indicting grand jury on July 8, 1981, the prosecutor asked for Mr. Raybin to be sworn in as a Grand Jury agent, saying this meant it was "very, very clear" that when the agent looked at evidence it was not so much as an IRS agent but as the Grand Jury's agent. The oath administered at that time also referred to secrecy to be maintained concerning the evidence, subject to instructions by the Foreman or a federal judge. (G.J. Tr., Colloquoy, July 8, 1981, 9:11 A.M., at 2-3). Agent Mendrop was given a similar oath. (G.J. Tr., Colloquoy, July 8, 1981, 12:14 P.M., at 2).

[18] *Compare United States v. Jones*, 766 F.2d 994, 1001 (6th Cir.), *cert. denied*, —— U.S. ——, 106 S.Ct. 526, 88 L.Ed.2d 458 (1985) ("agent of grand jury" sworn by foreman at prosecutor's request not prosecutorial misconduct) *with United States v. Claiborne*, 765 F.2d 784, 794 (9th Cir. 1985), *cert. denied*, —— U.S. ——, 106 S.Ct. 1636, 90 L.Ed.2d 182 (1986) (use of "grand jury agents" not proper).

any actual prejudice to them in the proceedings by overreaching the grand jury or usurping its independence through this conduct.

Moreover, we do not see how the invocation of Fifth Amendment rights by grand jury witnesses should lead to dismissal of the indictment. The record shows that once the privilege was invoked the Government attorneys ceased questioning. *See United States v. Thibadeau*, 671 F.2d 75, 78 (2d Cir. 1982). "[T]he privilege accorded one called before a grand jury is the election to refuse to give testimony which might tend to show he had committed a crime. It is not designed to effect a prohibition against inquiry by an investigative body." *United States v. Cefalu*, 338 F.2d 582, 584 (7th Cir. 1964). The fact that several witnesses planned to invoke their Fifth Amendment privilege if called before the grand jury cannot be transformed into a prohibition against inquiry. Once the privilege was invoked on the record, the prosecutors discontinued all questioning.[19]

Finally, the district court found that the prosecutor's mistreatment of a witness favorable to the defense prejudiced the defendants. 594 F.Supp. at 1343. We find the mistreatment of the witness, an expert on tax matters, unjustifiable. The mistreatment occurred during a recess but within the hearing of several grand jurors, witnesses, and attorneys. The district court's opinion, however, focuses entirely on the conduct of the prosecutor and not on any resulting prejudice to the defendants. We conclude that the defendants have failed to show how the grand jury's independence was breached. The defendants are hard put to argue that this incident

[19] During the grand jury investigation, one juror indicated that the grand jury might consider the fact that a witness asserted the Fifth Amendment privilege against self-incrimination. (G.J. Tr., Colloquoy, May 3, 1982, 9:15 A.M., at 7.) A prosecutor promptly cautioned the grand jury that it was not to consider the assertion of the privilege.

in the course of a twenty-month investigation threatened the grand jury's indcpendence. *See Pino*, 708 F.2d at 530.

There is a presumption of regularity that attaches to grand jury proceedings. *Hamling v. United States*, 418 U.S. 87, 139 n. 23, 94 S.Ct. 2887, 2918 n. 23, 41 L.Ed.2d 590 (1974). Here the defendants failed to sustain their burden of overcoming the presumption. The grand jury transcripts show an active, independent, and questioning grand jury, familiar with the record, one that thoughtfully questioned, rather than submitted to statements and suggestions of the Government attorneys.[20] The district

[20] It is evident from the grand jury transcripts that the prosecutors frequently reminded the grand jury of its independence and duty to make its own assessment of the evidence introduced before it. A prosecutor specifically advised the grand jury that "these men are entitled to a fair and impartial deliberation by the Grand Jury." (G.J. Tr., Colloquy, Aug. 5, 1981, 4:11 P.M., at 4). The prosecutor further stated to the grand jury:

> Once again, at any time you have a question, by all means, either ask me or ask my agents. I'll try to clarify it. Like I told you the first day, don't be satisfied with what we tell you. Push us. Make sure that the documents are there and the evidence is there and the testimony is there. If you don't think it is there, tell me and if I can't get it better to you, to your satisfaction, then I'm failing my duty.

(G.J. Tr., Colloquy, Sept. 9, 1981, 10:15 A.M., at 2).

Furthermore, just before the prosecutors asked the grand jury to return an indictment they reiterated the roles of the Executive Branch and the grand jury:

> Mr. Blondin and I are advocates, and we are paid advocates. Thus, you should remember that Mr. Blondin and I are just that: advocates. And what we have said to you in the past and will say to you today is that of an advocate, and you should consider what we say only in the light of what we say makes sense: is it logical? is it rational? is it based on evidence? If it is, then you should consider the argument; if you reject it and find it is weak at some point, then reject it.

(G.J. Tr., Colloquy, Sept. 30, 1982, 9:07 A.M., at 5).

The grand jury transcripts portray an active and questioning grand jury. During the investigation the grand jury vigorously

court erred in focusing primarily on the propriety of the Government's conduct rather than on possible interference with the integrity and independence of the grand jury. "Dismissal of an indictment returned after deliberation by a grand jury is a very drastic action." *Anderson*, 778 F.2d at 606. It can only be warranted when the misconduct complained of significantly infringes "on the grand jury's ability to exercise independent judgment." *Pino*, 708 F.2d at 530.

We conclude that the totality of conduct before the grand jury did not warrant dismissal of the indictment. The accumulation of misconduct by the Government attorneys did not significantly infringe "on the grand jury's ability to exercise independent judgment." *Pino*, 708 F.2d at 530. Accordingly we hold that the district court erred in its conclusions that the grand jury's function was usurped and that the indictment was tainted with illegality, 594 F.Supp. at 1349, 1352, following the *de novo* review we feel we should conduct. *See* Part II-B, *supra*. We are also persuaded that if those determinations are ultimate fact-findings, they are clearly erroneous in light of the record.[21]

questioned the prosecutors (*see, e.g.*, G.J. Tr., Colloquy, July 8, 1981, 8:39 A.M., at 9, 12, 13, 17; G.J. Tr., Colloquy, Aug. 5, 1981, 4:11 P.M., at 2-4) and the IRS agents (*see, e.g.*, G.J. Tr., Raybin, July 8, 1981, 9:11 A.M., at 13-14, 16-23, 33; G.J. Tr., Mendrop, Aug. 5, 1981, 4:04 P.M., at 3-7; G.J. Tr., Mendrop, Sept. 29, 1982, 9:32 A.M., at 14-15, 20-22, 25, 43-44, 47-49, 54; G.J. Tr., Raybin, Sept. 29, 1982, 2:32 P.M., at 20-21). Moreover, one juror questioned whether the evidence presented was sufficient to charge one of the defendants, the secretary Ms. Lerner, and vigorously interrogated the prosecutor on that point. (G.J. Tr., Sept. 29, 1982, 8:52 A.M., at 5-11).

[21] We have earlier explained our reasons for concluding that no showing justifying dismissal of the indictment was made in connection with the calling of witnesses who asserted their protection against self-incrimination. We quote below the colloquoy

As stated, we conclude that the accumulation of misconduct by the Government attorneys did not significantly infringe on the grand jury's ability to exercise

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cited by the dissent which shows the discussion and some reasons for calling the witnesses:

JUROR: I want to ask you a question. I know that we are not supposed to think anything when they take the Fifth Amendment; being human, we do.

MR. BLONDIN: Strike that out of your mind. You cannot assume—

JUROR: Can you speculate on why he wouldn't answer for us?

MR. BLONDIN: There are various reasons, and I can't speculate for you.

He has a right, especially since he is a target of the investigation, the right not to answer any questions a truthful answer to which may tend to incriminate him.

Now, I cannot speculate nor can the Grand Jurors, anybody in the room, speculate as to the reason why. You, as well as Mr. Pettingill, have that privilege; you can assert it for any reason: on advise of counsel, your own reasons, maybe your aunt or somebody else gave you advice on it. We are not going to speculate on it; and get rid of it, it has nothing whatsoever to do with your deliberations.

We cannot even begin to think of reasons for that. There could be some very legitimate reasons for him to assert the Fifth Amendmnet. Just the spector of a Grand Jury investigation—

JUROR: I'm sure that's easy for you and for us because we—

MR. BLONDIN: There are two options on what we can do when a witness takes the Fifth. All right, take it up—compel his testimony or her testimony, go to the Judge; the Judge says, "That's not privileged, you don't have a Fifth Amendment privilege, you testify. Give us answers."

At that point the witness says, "No, I am not going to testify." Then we go to court again, hold him in contempt; and it doesn't end there. There is an elaborate appellate procedure that we have to go through to get the issue resolved before we can get answers to questions that we propound before the Grand Jury.

The other option, we can give a witness immunity; and once he is granted immunity, we can compel him to testify, and he has no privilege.

Targets of the investigation, no immunity.

[Continued]

independent judgment. Without such infringement, the drastic remedy of dismissal of the indictment is unwarranted. We cannot agree that the remedy can be used without such a showing on the theory of exercise of supervisory powers, as the dissent concludes. Our decisions do not support such a view, and those of the Supreme Court have not established a different rule. In *Anderson* the opinion of Judge Kane is clear that his dismissal was based on an exercise of supervisory powers. 577 F.Supp. 223, 232-33 (D.Colo. 1983) ("It is well

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[21] [Continued]

JUROR: I got a question for you. You asked him who all had the right, I guess, to see these files; he pleaded the Fifth. How can that be incriminating to him?

MR. BLONDIN: There may be other people that have access to them, that we don't know about. He may not have known the answer and just took the Fifth. He, in this case, may have taken the Fifth on advise of counsel. That gets into speculation, and I can't. The questions I asked of him—and I was going to go in a more—go through it piece by piece, but I could see there is no way we could do that. All right. I tried to shortcut, just laid the foundation that these were business records, they were authentic business records that could be admissible.

The problem we had in the hearing before Judge Carrigan on the foreign corporations compelling production of those records was that there was objection made by defense counsel as to the admissibility of certain corporate records. We had subpoenaed Mr. O'Donnell and Mr. Kilpatrick, and we had asked their counsel to provide a custodian of records, somebody that could identify that these were business records.

They provided a witness that they assured us could identify the records, that would say they were corporate—a corporation does not have a Fifth Amendment privilege. All right. There are a number of Supreme Court cases that have resolved that issue, that a corporation has to provide a custodian to identify the records, and that's part of our foundation that the government or the prosecutor had to lay before the records could come in as evidence in a trial.

They objected to it. As a consequence of that we said, "All right, we are calling people in, and they are going to identify these business records." And that's why we have to go through this.

G.J. Tr., Colloquoy, Jan. 5, 1982, 8:09 A.M., at 22-25.

within a district court's supervisory powers to insure that the grand jury's integrity as an independent body is not destroyed in the public eye"), and the Judge concluded that the Government conduct there significantly impaired the grand jury's ability to exercise independent judgment. *Id.* at 234. We reversed, concluding that the grand jury's independence was not shown to have been infringed, citing *Pino*. *Anderson*, 778 F.2d at 604, 605, 606. Our *Pino* opinion, quoted by the dissent, is arguably unclear on the point. *Pino* does discuss the exercise of supervisory powers in a statement separate from that on infringement of the grand jury's judgment. However the full discussion in the opinion shows no holding that a dismissal is justified without "some significant infringement on the grand jury's ability to exercise independent judgment." *Pino*, 708 F.2d at 530 (citations omitted). That requirement is stated immediately following citations and a statement that "dismissal may be based on the Fifth Amendment Due Process Clause or upon the court's inherent supervisory powers." *Id.* In any event, *Anderson* makes clear the requirement of infringement of the grand jury's independence.

We do not read the Supreme Court's opinions as opening the door to dismissals on supervisory power notions without a showing of infringement on the grand jury's functions in cases like this. *McNabb v. United States*, 318 U.S. 332, 63 S.Ct. 608, 87 L.Ed. 819 (1943), relied on by the dissent, did say that it was unnecessary to reach the constitutional issue and reversed as an exercise of judicial supervision over the administration of criminal justice, "establishing and maintaining civilized standards of procedure and evidence." *Id.* at 340, 63 S.Ct. at 613. While this was the stated basis for the reversal, the opinion in no way suggests that such a ruling should be made without regard to the harmless error rule. *See* Fed.R.Crim.P. 52. *Young v. United States*, —— U.S. ——, 107 S.Ct. 2124, 95 L.Ed.2d 740 (1987), also furnishes no basis for a conclusion that the Court favors an exercise of supervisory powers to dismiss indictments without regard for whether the grand jury's functions were infringed. The plurality opinion (Brennan, Marshall, Blackmun and Stevens, JJ.), held that society's interest in disinterested prosecution would not adequately be protected by harmless error analysis, but there was no majority opinion expressing that view in the circumstances of that case. Moreover *Young* involved special circumstances where appointment of private counsel, having professional obligations to his client, for prosecution of a criminal contempt proceeding raised special conflicts problems of an unusual nature.

We remain convinced that the drastic remedy of dismissal of an indictment, whether premised on due process or supervisory powers theories, cannot be exercised without a significant infringement on the grand jury's ability to exercise independent judgment.[22] We are instructed clearly in *United States v. Hasting*, 461 U.S. 499, 509, 103 S.Ct. 1974, 1980, 76 L.Ed.2d 96 (1983), to ignore errors that are harmless, including most constitutional violations.[23] Finally, *United States v. Russell*, 411 U.S.

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[22] *Accord United States v. De Rosa*, 783 F.2d 1401, 1406-07 (9th Cir.), *cert. denied*, —— U.S. ——, 106 S.Ct. 3282, 91 L.Ed.2d 571 (1986) (defendant must show prejudice before court will dismiss indictment on either the constitutional or supervisory grounds); *United States v. Griffith*, 756 F.2d 1244, 1249 (6th Cir.), *cert. denied*, —— U.S. ——, 106 S.Ct. 114, 88 L.Ed.2d 93 (1985) (same); *United States v. McKenzie*, 678 F.2d 629, 631 (5th Cir.), *cert. denied*, 459 U.S. 1038, 103 S.Ct. 450, 74 L.Ed.2d 604 (1982) (same). *Contra United States v. Rosenfield*, 780 F.2d 10, 11 (3d Cir. 1985) (per curiam) *cert. denied*, —— U.S. ——, 106 S.Ct. 3294, 92 L.Ed.2d 709 (1986) (no prejudice required).

[23] The Court pointed out that deterrence is an inappropriate basis for reversal where an attenuated violation is involved "and where means more narrowly tailored to deter objectionable prosecutorial conduct are available." 461 U.S. at 506, 103 S.Ct. at 1979. And the Court referred specifically to such a less drastic remedy where a Government attorney made improper arguments to a grand jury. *Id.* at 506 n.5, 103 S.Ct. at 1979 n.5.

423, 435, 93 S.Ct. 1637, 1644, 36 L.Ed.2d 366 (1973), reversed a dismissal, cautioning against a "chancellor's foot" veto over law enforcement practices of which a court disapproves.

III.

The judgment of the district court dismissing the indictment is reversed and the cases are remanded with directions to reinstate all counts of the indictment.

SEYMOUR, Circuit Judge, dissenting.

I respectfully dissent from the view of the majority that prejudice to the defendant must be shown before a court can exercise its supervisory powers to dismiss an indictment on the basis of egregious prosecutorial misconduct. I would affirm.

It is beyond argument that the Government's conduct in this case was outrageous. As set out in two district court opinions, *United States v. Kilpatrick*, 594 F.Supp. 1324 (D.Colo. 1984), and *United States v. Kilpatrick*, 575 F.Supp. 325 (D.Colo. 1983), the record contains evidence constituting a laundry list of serious improprieties, most of which the majority neither disputes nor condones. Government officials repeatedly violated Fed.R.Crim.P. 6(d) by presenting two witnesses to the grand jury at the same time. *See* maj. op. at 1467-68, 1470. The Government routinely flouted the secrecy provisions of Fed. R.Crim.P. 6(e). First, it improperly used grand jury information in civil tax audits of taxpayers who invested in the tax shelters at issue, *see* maj. op. at 1471; second, it improperly disclosed the identity of the grand jury targets to people who were not grand jury witnesses but with whom the targets had business and professional relationships, *see id.* at 1472; and third, it improperly swore to secrecy two grand jury witnesses who had formerly represented the targets in S.E.C. proceedings involving the same tax shelters, *see id.* at 1472. During a

recess a Government attorney mistreated a tax expert, who had testified before the grand jury favorably to the targets, by shouting insults at and intimidating him in the presence of grand jurors, other witnesses, and attorneys.[1] *See id.* at 1472-73.

In addition, the Government attorney paraded seven witnesses before the grand jury knowing that they would invoke their Fifth Amendment privilege to refuse to answer any questions. I cannot agree with the majority's conclusion in footnote 19 that any prejudice arising from this presentation to the grand jury was eliminated by the prosecutor's admonition. The grand jurors had previously questioned the prosecutors on the use of the privilege, displayed frustration over its invocation, and discussed pursuing the matter with the district court to test the privilege. *See* rec., Remarks to grand jury, Jan. 5, 1982, at 22-29. Significantly, one grand juror stated: "I know that we are not supposed to think anything when they take the Fifth Amendment; being human, we do." *Id.* at 22. In view of this candid admission, the potential for prejudice arising from seven witnesses' refusal for fear of incrimination to discuss their involvement in the very matters upon which the grand jury was asked to indict cannot be denied. *Cf. United States v. Coppola*, 479 F.2d 1153, 1160 (10th Cir. 1973) (condemning conscious effort by Government to derive evidentiary value from adverse inference arising from invoking the privilege). Consequently, this court has held that it is improper for the Government to call a witness knowing that he will assert his Fifth Amendment privilege. *See id.*; *see also United States v. Crawford*, 707 F.2d 447, 449 (10th Cir. 1983).

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[1] The district court also found that the special agents who summarized the evidence against defendant Bank of Nova Scotia mischaracterized this evidence. *See Kilpatrick*, 594 F.Supp. at 1339-40. Although I agree with the majority that the agent's use of hearsay was not improper per se, *see* maj. op. at 1470, the majority does not address the serious allegation that the hearsay itself was inaccurate and misleading.

After numerous hearings before two trial judges, both judges found that the Government's pervasive misconduct evinced a deliberate and alarming disregard of standards imposed by the Federal Rules, Justice Department guidelines, ethical considerations, and civilized behavior.

> "The numerous abuses and violations of rules and constitutional principles must be considered particularly serious because of the admissions in these hearings that, for the most part, the activity was undertaken knowingly and purposefully."

Kilpatrick, 594 F.Supp. at 1352. Based on its finding that the Government's conduct was intentional, which includes credibility assessments this court may not lightly disregard, the district court found that "the substantial departures of prosecutors in this case from established notions of fairness, from clearly articulated rules of law, from specific rules of procedure and, indeed from the Department of Justice's own manual and operating directives constitute systematic and pervasive overreaching." *Id.* The court concluded that the cumulative effect of the Government's conduct prevented the grand jury from undertaking independent action. *Id.* at 1353.

Although acknowledging most of the improprieties set out in the lower court opinions, the majority does not agree with the district court that the Government's actions impaired the grand jury's ability to exercise its independent judgment, which is the standard that must be met before the indictment may be dismissed under the Fifth Amendment. Significantly, the majority also concludes that the sanction of dismissing the indictment is not a proper exercise of a district court's supervisory power unless the same standard is met, that is, unless there is a legally sufficient showing that the Government's misconduct adversely affected the grand jury's independence. Putting aside whether the impact of the Government prosecutors' behavior on the decision-making

process of this grand jury can realistically be evaluated, I do not believe that such a showing is a prerequisite to the pre-trial dismissal of an indictment under a court's supervisory power.

In *McNabb v. United States*, 318 U.S. 332, 63 S.Ct. 608, 87 L.Ed. 819 (1943), the Supreme Court did not employ a harmless error analysis in considering whether the invocation of its supervisory power was appropriate. To the contrary, the Court found it unnecessary to determine whether the defendants had been prejudiced by a constitutional violation before exercising its supervisory powers to reverse a conviction. In so doing, Justice Frankfurter said for the Court:

> "In the view we take of the case, however, it becomes unnecessary to reach the Constitutional issue pressed upon us. For, while the power of this Court to undo convictions in state courts is limited to the enforcement of those 'fudamental principles of liberty and justice; *Hebert v. Louisiana*, 272 U.S. 312, 316 [47 S.Ct. 103, 104, 71 L.Ed. 270 (1926)], which are secured by the Fourteenth Amendment, the scope of our reviewing power over convictions brought here from the federal courts is not confined to ascertainment of Constitutional validity. Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence. Such standards are not satisfied merely by observance of those minimal historic safeguards for securing trial by reason which are summarized as 'due process of law' and below which we reach what is really trial by force."

Id. at 340, 63 S.Ct. at 613.

In a recent consideration of supervisory powers, the Court set out the three purposes underlying their use: 1) to remedy the violation of recognized rights; 2) to

preserve the integrity of the judicial process; and 3) to deter illegal conduct. *See United States v. Hasting*, 461 U.S. 499, 505, 103 S.Ct. 1974, 1978, 76 L.Ed.2d 96 (1983). The Court pointed out that securing these objectives by the exercise of supervisory power may frustrate the societal concern for the conservation of judicial resources and the prompt administration of justice embodied in the harmless error rule. *See id.* at 509, 103 S.Ct. at 1980. The Court held that a court contemplating the exercise of its supervisory power must weigh the benefits to be obtained against the cost to the countervailing interest in finality. *See id.* at 506-07, 103 S.Ct. at 1979. The weight to be given the harmlessness of the error obviously increases in significance when the balancing is done after trial and conviction.[2] Implicit in the Court's guidance on this issue is its recognition that although the harmlessness of the alleged misconduct is an element to be balanced against the desired result, it is *not* always dispositive. If the exercise of supervisory power were per se precluded by a finding of lack of prejudice, a balancing process would never be necessary.

Our opinion in *United States v. Pino*, 708 F.2d 523 (10th Cir. 1983), was filed only three days after *Hasting* and does not cite that decision. Moreover, I cannot agree with the majority's reading of *Pino* to establish that prosecutorial misconduct must be shown to have affected the grand jury's independence before supervisory power can be invoked, particularly in a pretrial setting. In *Pino*, the defendant contended that the prosecutor's behavior *had* unfairly infringed on the grand jury's independent judgment. The district court found no effect,

[2] Although *United States v. Mechanik*, 475 U.S. 66, 106 S.Ct. 938, 89 L.Ed.2d 50 (1986), did not address the exercise of supervisory power, the Supreme Court's decision to reverse the automatic dismissal of an indictment for a Rule 6(d) violation was premised upon the importance the Court placed upon finality when an indictment is dismissed for a technical, harmless error *after* trial. *See id.* 106 S.Ct. at 942-43.

and the defendant appealed after his conviction. This court pointed out that dismissal of an indictment may be based either on the Fifth Amendment Due Process Clause or the court's inherent supervisory powers. *See id.* at 530. We distinguished between those two inquiries, however, stating:

> "We are not persuaded that the circumstances as a whole show such flagrant misconduct that the grand jury was overreached or deceived in some significant way, or that the prosecutor's conduct significantly infringed on the ability of the grand jury to exercise its independent judgment. *We are also not convinced that the circumstances here justify exercise of the court's supervisory power to protect the integrity of the judicial process by dismissing the indictment.*"

Id. at 531 (citation omitted) (emphasis added). Our separation of these distinct bases for dismissing an indictment indicates that *Pino* should not be read to hold that the finding of prejudice needed to support a dismissal on due process grounds is also required when supervisory powers are invoked.

Our subsequent cases citing *Pino* to require a showing of prejudice simply do not indicate which basis for dismissing the indictment was at issue. *See United States v. Page*, 808 F.2d 723, 726 (10th Cir. 1987); *United States v. Buchanan*, 787 F.2d 477, 487 (10th Cir. 1986); *United States v. Anderson*, 778 F.2d 602, 604-05, 606 (10th Cir. 1985).[3] It is also important to emphasize

[3] I cannot agree with the majority that our opinion in *Anderson* makes clear the requirement of prejudice. The district court opinion in *Anderson* refers to the denial of due process as a basis for its decision to dismiss the indictment, both by its own discussion of the constitutional function of the grand jury and by its references to the discussion of that constitutional function in *United States v. Dionisio*, 410 U.S. 1, 16-17, 93 S.Ct. 764, 772-73, 35 L.Ed.2d 67 (1973). *See United States v. Anderson*, 577 F.Supp. 223, 230-32

that, contrary to the present case, *Hasting*, *Pino*, *Page*, and *Buchanan* are all cases in which the argument to dismiss the indictment was made after conviction, a time at which the interest in finality is very substantial and the harmlessness of the error is therefore weighted heavily.[4] Moreover, we said in *Page*:

> "This clearly is not a case involving abuse, bad faith, or vindictiveness. Instead the prosecutor's failure to correct Agent West's testimony was, at worst, an oversight. The extraordinary remedy of dismissal of the indictment is not called for here."

808 F.2d at 727.

In sum, I am convinced that neither the Supreme Court in *Hasting* nor our opinions in *Pino* and its progeny establish that a court is barred from exercising its supervisory powers to dismiss an indictment *prior to trial* absent a showing that the misconduct affected the grand jury's charging decision. Such a requirement would render a court's supervisory power superfluous because misconduct that does affect the grand jury's independence is a constitutional violation remediable under the Fifth Amendment.

The circuits are split on the need to show prejudice. *See United States v. Holloway*, 778 F.2d 653, 658-59 (11th Cir. 1985) (noting authority on both sides of issue), *cert. denied*, —— U.S. ——, 106 S.Ct. 2276, 90 L.Ed.2d 719 (1986). The Third Circuit has specifically rejected the prejudice requirement when there is "evidence that the challenged activity was something other

(D.Wyo. 1983). Our opinion in *Anderson*, which does not refer to the exercise of supervisory powers, concludes only that "the record in the instant case does not support the conclusions of the trial court which formed the basis for the dismissal." 778 F.2d at 606.

[4] Although in *Anderson* this court did reverse a dismissal granted prior to trial, we held that, contrary to the conclusion here, none of the challenged conduct was improper.

than an isolated incident unmotivated by sinister ends or that the type of misconduct challenged has become 'entrenched and flagrant' in the circuit." *United States v. Rosenfield*, 780 F.2d 10, 11 (3rd Cir. 1985) (per curiam) (quoting *United States v. Serubo*, 604 F.2d 807, 817 (3rd Cir. 1979), *cert. denied*, —— U.S. ——, 106 S.Ct. 3294, 92 L.Ed.2d 709 (1986). *Contra United States v. Griffith*, 756 F.2d 1244, 1249 (6th Cir.), *cert. denied*, —— U.S. ——, 106 S.Ct. 114, 88 L.Ed.2d 93 (1985); *United States v. McKenzie*, 678 F.2d 629, 631 (5th Cir.), *cert denied*, 459 U.S. 1038, 103 S.Ct. 450, 74 L.Ed.2d 604 (1982). This standard comports with the Supreme Court's indication that a showing of prejudice is not required when the record reveals "a pattern of recurring violations." *United States v. Morrison*, 449 U.S. 361, 366 n. 2, 101 S.Ct. 665, 668 n. 2, 66 L.Ed.2d 564 (1981). Further, such a test is not inconsistent with *Hasting* and our circuit opinions, and is particularly appropriate when, as here, a dismissal is granted prior to trial.[5]

Although I recognize that supervisory powers should be exercised sparingly, I would apply the Third Circuit criteria in this case and uphold the district court's dismissal. After an evidentiary hearing, the district court here found that the ongoing misconduct, which pervaded the investigation of the case and its presentation to the grand jury, was motivated by bad faith and "improper strategic purpose[s]". *See, e.g., Kilpatrick*, 594 F.Supp. at 1335, 1338. The evidence clearly supports this credibility determination. The record of the Government's conduct evinces a determination to circumvent or simply ignore the standards governing grand jury proceedings when to do so would enhance the presentation of its case. Under these circumstances, the district court was within its discretion in exercising its supervisory power to pro-

[5] As the majority recognizes, Kilpatrick is in essentially the same position as a pretrial defendant because he was granted a new trial. *See* maj. op. at 1470.

tect the integrity of the judicial process and to deter illegal conduct, *see Hasting*, 461 U.S. at 505, 103 S.Ct. at 1978, particularly when the interest in finality had not been supported by a conviction.

Finally, it is important to point out that the exercise of supervisory power in this case does not violate the separation of powers by encroaching on the prosecutor's authority. A prosecutor may not invoke separation of powers to avoid the consequences of his intentional disregard of *judicial standards* specifically directed toward his conduct. The Supreme Court recently held that a court may exercise its supervisory authority to appoint a special prosecutor notwithstanding the argument that to do so would usurp the prosecutor's function. *See Young v. United States*, —— U.S. ——, 107 S.Ct. 2124, 95 L.Ed.2d 740 (1987). "The exercise of supervisory authority is especially appropriate in the determination of the procedures to be employed by courts to enforce their orders, a subject that directly concerns the functioning of the judiciary." *Id.* at ——-——, 107 S.Ct. at 2138. This holding is equally applicable when, as here, a court exercises its supervisory authority to enforce the Criminal Rules, which are also directly concerned with the functioning of the judicial process.

I conclude that a finding of prejudice to the defendant should not be required to dismiss an indictment when prosecutorial misconduct during the grand jury proceedings is pervasive. Prejudice to the integrity of the judicial process should be sufficient. Because the lower court's exercise of its supervisory power is supported by the facts and the law, I would affirm the dismissal of the indictment.

APPENDIX C

UNITED STATES DISTRICT COURT
D. COLORADO

Crim. No. 82-CR-222

UNITED STATES OF AMERICA,
Plaintiff,

v.

WILLIAM A. KILPATRICK, DECLAN J. O'DONNELL, JOHN PETTINGILL, SHEILA C. LERNER, MICHAEL L. ALBERGA, C.S. GILL, C.M. SMITH, BANK OF NOVA SCOTIA,
Defendants.

Sept. 24, 1984

Charles Alexander, Trial Atty., U.S. Dept. of Justice, Tax Div., Washington, D.C., and Robert N. Miller, U.S. Atty., Linda S. Surbaugh, Asst. U.S. Atty., Denver, Colo., for U.S.A.

William C. Waller, Richard K. Rufner, Wagner & Waller, P.C., Englewood, Colo., for Kilpatrick.

James L. Treece, Littleton, Colo., for O'Donnell.

David L. Hiller, Duboskey & Hiller, Denver, Colo., for John Pettingill.

Thomas French, Dill, Dill & McAllister, Denver, Colo., for Lerner.

Donald E. Van Koughnet, Naples, Fla., for Alberga & Gill.

C.M. Smith, No Appearance.

James E. Nesland, Ireland, Stapleton & Pryor, Denver, Colo., and Robert J. Anello, Obermaier, Morvillo & Abramovitz, New York City, for Bank of Novia Scotia.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

KANE, District Judge.

PROCEDURAL BACKGROUND

After a twenty month investigation conducted before two successive grand juries, the instant proceeding was commenced on September 30, 1982 by the filing of a twenty-seven count indictment charging seven individuals and The Bank of Nova Scotia with conspiracy, mail fraud and tax fraud and also charging William A. Kilpatrick with obstruction of justice (Count 27). The bank was charged in ten counts with conspiracy to defraud (18 U.S.C. § 371) (Count 1) and aiding and abetting a mail fraud (18 U.S.C. § 1341 and § 2) (Counts 13 through 21).

On February 21, 1983, I dismissed the first twenty-six counts of the indictment for failure to charge a crime and as improperly pleaded. Additionally, upon separate motion by the bank, I dismissed the charges in which the bank was named upon the ground that the indictment failed to allege that the bank or any of its representatives had the requisite knowledge and intent to commit the crimes charged. The government appealed the dismissals.

On August 8, 1983, after briefing but before oral argument, the Tenth Circuit entered an order partially remanding the case to me so that all defendants could participate in hearings to determine whether prosecutorial misconduct and irregularities in the grand jury process constituted additional grounds for dismissal.

Before and immediately after the partial remand by the Tenth Circuit, the Honorable Fred M. Winner, Senior United States District Judge, presided over post-trial motions hearings following a guilty verdict against Mr. Kilpatrick on Count 27. On August 25, 1983, at about the time of his retirement from the bench, Judge Winner issued a memorandum decision which, among other things, summarized the status of the hearings which were being reassigned to me. Further, Judge Winner ordered that the government provide defendants with copies of transcripts of all proceedings that occurred before the grand juries. After some bizarre episodes of procedural novelty, Judge Winner's opinion was finally published. *See United States v. Kilpatrick*, 575 F.Supp. 325 (1983). The instant Findings of Fact, Conclusions of Law and Order must be read in conjunction with Judge Winner's opinion.

The government attorneys failed to provide defendants with complete transcriptions as ordered. They apparently overlooked, and did not transcribe, dozens of proceedings before the grand jury. The latter proceedings—which converted into hundreds of pages of transcript and, more significantly, disclosed clear violations of Rule 6—were not produced until the defense detected the lack of compliance with Judge Winner's order. Even now, the government remains unable to provide transcripts of all the proceedings and was unable to produce a single Rule 6(e) order (which government attorneys testified they obtained) authorizing several major disclosures of grand jury matters. The government asserts that it had turned over such transcripts as could be had as soon as they were received from the court reporter. Such, in my view, does not excuse the failure to produce completed and accurate transcripts. If the assertion minimizes the inference of dissimulation, it exacerbates stronger ones of confusion and indifference.

FACTS ESTABLISHED BY THE RECORD [1]

A. Grand Jury Agents

Despite detailed instruction from the impaneling court that the grand jury should maintain its independence and not develop into a "prosecutor's agent," shortly after both juries involved in the investigation leading to the instant indictment were sworn, the prosecutors created the office of "agent of the grand jury" for Messrs. Mendrop and Raybin, Special Agents assigned by the IRS to assist the prosecutors.[2] Several months later an IRS agent assigned to the civil division and who the prosecutors relied upon as an expert was also sworn in as an "agent of the grand jury." G.J. Tr. Schneider, May 3, 1982, 1:34 p.m., at pp. 2-3. The prosecutors divined the office of "grand jury agent" by personally administering oaths before the grand jury to Raybin, Mendrop and Schneider.[3] The government concedes that the prosecutors

[1] The facts relied upon in this opinion are taken from voluminous transcripts of hearings before two grand juries, Judge Winner, and me and a trial before a jury. To aid the reader, the following citation form is used: references to the trial to the jury presided over by Judge Winner are cited as "T. Tr."; references to hearings on the motion for a new trial or acquittal and the motion to dismiss before Judge Winner are cited as "W. Tr."; and references to hearings on the motions underlying this order are cited as "K. Tr." Citation of the grand jury transcripts are captioned "G.J. Tr." and recite the relevant witness or declarant, the date and the time of the transcription. Defense and prosecution exhibits submitted on this matter are designated respectively "DX" and "PX."

[2] The government seeks to absolve the prosecutors of any misconduct by pointing to instances where the prosecutors themselves informed the grand jury of its independent and unbiased mission. *See, e.g.*, G.J. Tr. Remarks of Prosecutor, July 8, 1981, 8:39 a.m. at pp. 9, 11; October 6, 1981, 10:58 a.m., at pp. 2, 3; September 29, 1982, 8:52 a.m., at p. 8. Such admonishments, however, are not curative of actions taken at other times which constitute abuses of the system and impinge upon the grand jury's integrity.

[3] Agent Raybin testified that before Mr. Snyder gave him his oath as an agent of the grand jury, he was also sworn in by the foreman of the grand jury. K.Tr. 267.

possessed no authority to administer such oaths. Indeed, the prosecutor who administers the oaths now concedes he created the oath and was "shooting from the hip" when he did so. K.Tr. 501.

The government argues that this event should be viewed as a technical mislabeling of no great import. It is, however, more than a misnomer.

First, the prosecutor's description to the grand jury of the role of a "grand jury agent" clearly misled the grand jury as to the appropriate role of the IRS agents in the proceedings. *See* Winner opinion, 575 F.Supp. at 329. As conceded by the prosecutor, there is simply no basis for his description to the grand jury of the role of grand jury agents.[4] K.Tr. 501.

Second, the grand jury was consistently reminded of the agents' uniquely created and described role and urged to rely upon the IRS special agents as their "agents." Thus, on many occasions when Raybin and Mendrop appeared as witnesses the government attorney reiterated that they were appearing as "agents of the grand jury." [5]

[4] Snyder did suggest that the swearing in of grand jury agents was practiced in Atlanta, Georgia and the Southern District of Florida. He did not, however, testify as to what grand jury agents did in these other districts or whether the practices employed elsewhere were similar to those used here. K.Tr. 414-15.

[5] On some occasions Mr. Snyder referred to Raybin and Mendrop as his agents. G.J. Tr. Remarks of Prosecutor, July 8, 1981, 8:30 a.m., at pp. 9, 15, 18, 21, 23; July 8, 1981, 12:05 p.m., at p. 5; August 5, 1981, 3:50 p.m., at p. 5; September 9, 1981, 8:37 a.m., at p. 2; September 9, 1981, 10:00 a.m., at p. 2; October 6, 1981, 10:58 a.m., at p. 12; May 3, 1982, 9:15 a.m., at p. 5. Such references did not, however, clarify the ambiguous role of the grand jury agents. As noted, the IRS agents were often referred to as agents of the grand jury. The confusion over the agents' role is discernible from isolated statements made by the prosecutors to the grand jury. Snyder, for example, said that he would, "have my agents, when I ask them to be sworn as agents of the Grand Jury,

See e.g., G.J. Tr. Mendrop, August 4, 1981, 9:25 a.m., at p. 2, August 5, 1981, 4:04 p.m., at p. 2, September 29, 1982, 9:32 a.m., at p. 2; G.J. Tr. Raybin, July 8, 1981, 9:11 a.m., at p. 5, March 3, 1982, 1:19 p.m., at p. 2, September 29, 1982, 2:32 p.m., at p. 2. Further, the government attorneys assigned special importance to identifying the IRS agents with the grand jury. When conducting interviews in connection with the investigation, Raybin and Mendrop were directed by the prosecutor to inform witnesses that they were "assisting a grand jury investigation in the Judicial District of Colorado." K.Tr. 619; *see also* G.J. Tr. Mendrop, August 5, 1981, 4:04 p.m., at p. 2; G.J. Tr. Raybin, July 8, 1981, 9:11 a.m., at p. 5, September 29, 1982, 2:32 p.m., at p. 2.[6]

Third, contrary to the role of the IRS agents described to the grand jury by the prosecutors, Mendrop and Raybin *did not* view their role and conduct their investigation as agents of an independent, unbiased grand jury. Rather, they viewed their role as agents of the Department of Justice, not the grand jury. When asked if his function as an agent of the grand jury was to assist the grand jury, Raybin testified:

> A: My duties were designed to assist the Department of Justice in its investigation. . . .

K.Tr. 232.

Mendrop similarly interpreted his role as agent of the grand jury to be "primarily" to assist the prosecutors:

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analyze [the documents] and basically figure out what they mean." G.J. Tr. Remarks of Prosecutor, July 8, 1981, 8:39 a.m., at p. 21; *see also* G.J. Tr. Remarks of Prosecutor, July 8, 1981, 12:05 p.m., at p. 5. The agents worked, in form, for the grand jury; but, in substance, they worked for the prosecution.

[6] Mendrop and Raybin claim that they never introduced themselves to witnesses as agents of the grand jury. K.Tr. 243, 266-67, 366-67.

> Q: . . . Mr. Mendrop, who were you really assisting in this matter during the grand jury investigation?
>
> A: Well, *primarily, I was assisting the attorneys for the government* and indirectly I'm sure that I must have been assisting the grand jury through the work that I was doing for the investigation that they were, that they had under consideration.
>
> Q: Well, in fact, you directly represented to the grand jury that you were assisting them, did you not, sir?
>
> A: I'm not sure how you mean that.
>
> Q: In fact, you represented to the grand jury that you were their agent and Mr. Snyder also represented to the grand jury that you were their agent; is that correct, sir?
>
> A: I believe those words were used, yes, sir.

K.Tr. 401-02 (emphasis supplied).

Ironically, the government attorneys who created the grand jury agents and described their role are confused themselves as to whether the "agents" roles should be considered aligned with that of independent grand jurors or the prosecutors.[7] K.Tr. 534-35; 1126.

Fourth, the government attorneys used the "grand jury agents" to do more than assist the attorneys in the investigation. They used them to summarize evidence in front of the grand jury. On the first day that the second grand jury convened, after his pseudo-investiture as a grand jury agent, Raybin summarized the investigation so far conducted, explained tax shelters to the jury, and opined that the circular financing utilized in the tax shelters under investigation was illegal. *See* G.J.Tr. Raybin,

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[7] *See supra* note 5 and accompanying text.

September 29, 1982, 2:32 p.m.; Mendrop, September 29, 1982, 9:32 a.m.; Raybin, September 30, 1982, 10:40 a.m. Similar kinds of substantive testimony were given by Raybin on September 9, 1981 and March 3, 1982. *See* G.J. Tr. Raybin, September 9, 1982, 10:02 a.m.; March 3, 1982, 1:19 p.m. On September 29 and 30, 1982, when the government attorneys, and apparently the "agents of the grand jury," were seeking the indictment, Raybin and Mendrop purported to summarize the evidence for the grand jury to support the 27 count indictment presented by the government attorneys. On September 30, 1982, Schneider appeared as "the expert" in the field of tax shelters to summarize the legal theory. G.J. Tr. Schneider, September 30, 1982, 9:22 a.m. These summaries contained numerous inaccuracies and were misleading in several aspects. Although the government attorneys were quick to inform the grand jury of their role as advocates, the grand jurors were never informed that their "agents" were "primarily" representing the interests of the Department of Justice attorneys.

Finally, the prosecutors' creation and use of grand jury agents resulted in many other abuses and Rule 6 violations. Most notably the agents made many joint appearances before the grand jury, without the presence of government counsel, and read transcripts to the jurors. K.Tr. 483-87; 636-39; 691-92; 707-12.

Raybin and Mendrop appeared before the second grand jury to give testimony regarding the investigation. Each time they appeared alone, were sworn, and were examined by the government attorneys. When they appeared to read testimony from the first grand jury to the second grand jury, they appeared together, were apparently not sworn, and were not examined by government attorneys because the latter were usually absent. It is not clear in what capacity they were appearing to read testimony. The confusion was exacerbated by two other IRS agents—Burke and Shea—also appearing together to read testimony to the second grand jury. In what capacity they were appearing is even less evident since they were not made "grand jury agents" and the record of their appearance does not support a finding that they were witnesses.

The transcripts of the agents' simultaneous appearances establish that they were not present as witnesses. They appear not to have been sworn; they appeared together; they were not examined; and they were mostly unaccompanied by government attorneys. The testimony of the prosecutors and agents that the agents were sworn, even if evidenced by a transcript, would not authorize their simultaneous appearances under Rule 6(d). The recollection of the prosecutors and agents that the oath was administered is challenged by the almost dozen transcripts showing the oath was not administered on any single occasion where the agents appeared together.

The record reveals that the agents' many appearances before the second grand jury, whether sworn or unsworn, were largely unsupervised. The agents were frequently unattended by government attorneys and, in some instances, may have convened the grand jury sessions without government counsel in order to read testimony. K.Tr. 483-87; 636-39; 691-92; 707-12.

In other instances the transcripts do not make clear precisely when the agents entered or left the grand jury room. It appears that they may have been present while the prosecutors engaged in colloquy with grand jurors. G.J. Tr. Remarks of Prosecutor, February 2, 1982, 1:07 p.m. at p. 18; Remarks of Prosecutor, February 4, 1982, 3:30 p.m. at pp. 2-3; Remarks of Prosecutor, April 6, 1982, 9:08 a.m. at p. 8.

Both prosecutors acknowledge that the agents "*were not* under examination" when they read to the grand jury. K.Tr. 485 (emphasis supplied); *see also* K.Tr. 707. The conclusion that they were not under examination is

inescapable because no attorney was present to conduct an examination. Further, the grand jurors were under instructions *not* to question the agents during such appearances. K.Tr. 481-87.

B. Improper Disclosure, Improper Use and Secrecy Violations

During the course of the grand jury investigation, the government representatives systematically disregarded the strictures of Rule 6(e). The record demonstrates that the responsibility and decision making authority that Rule 6(e) vests in government attorneys was relinquished to and exercised by the Internal Revenue Service. Members of that agency undertook a policy of determining whether and to whom disclosure of confidential material would be made and whether notification of such disclosure would be made pursuant to the Federal Rules. Moreover, the evidence suggests that information was disclosed to other IRS agents for use in civil cases. Grand jury secrecy was repeatedly breached by those with a duty to remain silent and secrecy obligations were imposed upon others of whom the law does not require confidentiality.

(1) Disclosure

The disclosure notices filed pursuant to Rule 6(e)(3)(B) indicate that numerous individuals at all levels of the Internal Revenue Service, many of whom were assigned from the civil division of that agency, were permitted access to grand jury material. DX Q; *see* K.Tr. 26, 29-36, 40, 43, 50. The hearings have demonstrated that numerous other IRS personnel (all of whom were civil personnel), were given access to grand jury material, that these people were never identified on a disclosure notice and that they remain unknown even now.

That the decision as to which individuals should be privy to the grand jury material was frequently made

by the IRS, rather than by the prosecutors, was admitted by the agents.[8] K.Tr. 241. That it was the norm is confirmed by several additional facts. Disclosure was made liberally and often before obtaining attorney approval, an act the prosecutors acknowledged violates Department of Justice rules. K.Tr. 57-69; 754. Notice of such disclosure was not made "promptly" as required by Rule 6(e). The decision as to which names to include on the disclosure lists was largely left up to the IRS agents. The integrity of the lists themselves, as well as the decisions to make disclosure to the listed personnel, is lacking. The government attorneys admitted that they were unable to identify a substantial number of those named on the disclosure notices. K.Tr. 498-99. Further, these notices were frequently filed by attorneys having little relationship to the investigation. *See* K.Tr. 15-67; DX Q. The IRS agents were likewise unable to identify many of the persons on the list or why they were listed. K.Tr. 14-22, 30, 36-38, 39, 43-44, 56, 60-61, 65, 69, 106-09.

Perhaps the best illustration of the insouciance with which grand jury disclosures were made and recorded appears in the circumstances surrounding the post-indictment notice. The agents were directed by the government attorneys to pick their brains and prepare a catch-all disclosure notice listing any individuals whom they could recall may have had access to secret grand jury materials but who were not listed as required. Thus, on October 20, 1982, approximately three weeks after the indictment was returned, a final notice of disclosure adding sixteen names of IRS employees was filed. K.Tr. 57-59.

The agents' post hoc attempt to determine to whom disclosure had been made in order to supplement the dis-

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[8] The government claims that all prosecutorial decisions made by IRS agents were done in consultation with the prosecuting attorneys. K.Tr. 145-46.

closure notices was not entirely successful. Numerous persons with access to grand jury material were forgotten and never included on the notices. The discovery of these forgotten people occurred only because, during the hearings, government representatives testified at length concerning two computer programs compiled from grand jury documents, ostensibly for purposes of assisting in the grand jury's investigation. *See, e.g.*, K.Tr. 71-79, 87-91, 157-61. The performance of this function was riddled with Rule 6(e) violations.

Although the prosecutors testified that a court order was obtained permitting the transfer of the derivative grand jury information for that purpose to Lowry Air Force Base, the government was unable to produce such an order at the hearings. K.Tr. 494-9; 517; 755; 807. The prosecutors acknowledge that no order was obtained permitting transfer of similar information to Dallas and Utah, a failure caused by their unawareness even at the hearing that the IRS agents had taken it upon themselves to arrange for the computer work to be done at those locations and because the prosecutors left the "details" of the computer work to the IRS. K.Tr. 87-88, 494-96, 523, 807.

Many IRS employees with access to information used in compiling the computer program were eventually listed on the disclosure notices. *See* K.Tr. 34, 40, 43, 61, 72, 76, 78. Just as many, however, apparently never found their way onto the lists. Although the computer programs were created by computer "groups" in Dallas and Ogden (K.Tr. 74-76), the Disclosure Notices list few, if any, of the computer personnel from Utah or Texas. The indifference of the government attorneys is further revealed by the fact that a student clerk assisting the prosecutors was not listed as having had access to grand jury material although it was revealed at these hearings that she did. K.Tr. 1085-87.

Whatever instructions there were, if any, concerning disclosure and use of the grand jury material was apparently passed on by the staff of the Internal Revenue Service itself and not by the Department of Justice attorneys. Little or no instruction concerning the strictures of Rule 6(e) is included in the training of many of those IRS employees who had access to the information. K.Tr. 155.

Further, when the IRS agents acting as "agents of the grand jury" undertook the task of explaining the secrecy provisions to other employees of the IRS, it is clear that the information was of little practical use. For example, one such agent testified that, although he informed the supervisor of the computer program that he should disclose information only to one whose name was listed on the disclosure notices, only a few of the names on those lists were revealed to the supervisor. K.Tr. 155.

(2) Improper Use

The free rein given the IRS by the Department of Justice attorneys in this investigation and in the use and disclosure of grand jury material presents a serious possibility that the extraordinary powers of the grand jury were manipulated in order to obtain evidence useful in later civil litigation. The record reveals that such a danger was real and that substantial investigative activities disclosures were made for purposes other than "to assist an attorney for the government in the performance of [his] duty to enforce federal criminal law." *See* Rule 6(e)(3), Fed.R.Crim.P.

IRS institutional intent to take advantage of the grand jury investigation in civil audits was confirmed by Richard Gullion, a civil IRS agent assigned to the examination division in Denver, who freely acknowledged that the IRS hoped to take advantage of the facts developed by the criminal investigation after conclusion of the crim-

inal proceedings. W.Tr. 836-38. The government, in resisting this claim, has asserted that no improper disclosure to IRS civil agents has occurred. K.Tr. 150-51, 413-14, 416-17, 645-46. Disclosure is only one of the forbidden purposes. It is equally improper to manipulate the grand jury investigation to obtain evidence for eventual civil use by the IRS. *United States v. Sells Engineering, Inc.*, 463 U.S. 418, 103 S.Ct. 3133, 77 L.Ed.2d 743 (1983). As is discussed below, the record confirms that the grand jury's extraordinary powers and resources were, in part, initiated and channeled for just such a purpose.[9]

The government's investigation of defendants originated at the IRS in 1979. From August, 1979 to July, 1980, the IRS conducted a joint civil and criminal investigation. In July, 1980, the IRS referred its investigation to the Tax Division of the Department of Justice with the recommendation that a grand jury investigation be conducted because its administrative processes were potentially ineffective. DX M.

The agents' testimony that they abandoned all civil interests when the grand jury commenced reminds me of Joel Chandler Harris' story about Bre'r Rabbit asking the fox not to throw him in the briar patch. At least one witness believed that the government was anxious to build civil cases through the use of grand jury information. W.Tr. 73-74. Several facts confirm that the IRS agents did not abandon entirely IRS civil interest in recouping taxes.

For example, agents of the IRS interviewed numerous tax shelter investors. The interviewees were threatened

[9] The occasional self-serving statements by prosecutors to the grand jury that use of grand jury information in IRS audits is improper does not absolve the improper disclosures but merely serves to highlight the seriousness of the misconduct. G.J. Tr. Remarks of Prosecutor, July 8, 1981, 8:30 a.m., at pp. 12-13; November 4, 1981, 9:12 a.m., at p. 6.

that if they did not speak voluntarily a grand jury subpoena might be obtained. Thus, they were informed that the interview was being conducted in lieu of a grand jury appearance. K.Tr. 191. In connection with these investor interviews the IRS agents assisted in the creation of "Investor Questionnaires." These questionnaires instructed interviewers to ask numerous questions concerning the tax shelters. Several of the questions involved investor motives, a subject of no conceivable relevance to a criminal investigation of the targets but highly relevant in a civil audit of the investor. DX W; G.J. Tr. Raybin, January 6, 1981 at pp. 4-7. That this interviewing program had no criminal investigation purpose is demonstrated by the fact that no investor, let alone any investors interviewed, appeared before the grand jury. None of the interviews, nor the results of the interviews, was presented to the grand jury. K. Tr. 149. The government offered no explanation at the hearings of why and for what purpose such interviews were conducted.

Civil IRS employees, armed with grand jury information, were brought into the investigation to prepare audits of the tax shelter investors. These audits, like the interviews, were not presented to the grand jury and no reasons or explanations for their preparation were offered at the hearings. K. Tr. 149.

IRS activity since the return of the indictment confirms its intent to utilize the grand jury investigation and information for civil litigation purposes. Since return of the indictment the IRS has issued civil audit letters to the investors interviewed, notifying them that their returns were being examined. The letters read in part: "[a] report will be issued in the near future containing a position consistent with *facts* as presented in the Federal Grand Jury Indictment of September 30, 1982, for the United States District Court for the District of

Colorado." DX L (emphasis supplied); *see also* K. Tr. 176-78, 344-48.

Finally, several statements attributed to the prosecutors by witnesses during the course of the investigation confirm that the grand jury proceedings, at least in part, were conducted for other than legitimate federal criminal purposes. Richard Birchall, a former attorney with the Department of Justice, testified that "[t]here was a vengeance to the manner in which [the prosecutor] conducted the investigation." W.Tr. 69. Mr. Birchall also reported that on one occasion the prosecutor indicated that even if he were unsuccessful on the merits, the defense would be excessively expensive to the defendants. W. Tr. 133.

A similar improper motive was testified to by Donald Morrison a witness who made numerous grand jury appearances. With regard to a proposed business activity of some of the defendants, Morrison testified that a prosecutor indicated they were going to "shoot in [the] ass [the] coal deal." W. Tr. 192. These statements were vigorously denied by the prosecutors. I am in no position to resolve the obvious conflict in the testimony by assessing the credibility of witnesses appearing before Judge Winner with those appearing before me. Thus, I do not find as a fact that the statements were actually made. I describe them here because they illustrate the infusion of hostility and vitriol which permeates this entire case—a condition which I attribute to the frequently rude, consistently arrogant, and occasionally obnoxious conduct of some of the government attorneys assigned to the prosecution of this case.[10]

(3) Secrecy Violations

Several instances demonstrate blatant disregard for the time-honored tradition of grand jury secrecy. As discussed below, such violations were utilized by the

[10] For examples, see sections of this opinion entitled "Facts Established by the Record," F. and G.

government, not only to gain what was certainly perceived as an advantage in connection with the intended prosecution but were also apparently part of an improper attempt to embarrass the targets and hinder the ongoing operation of their business during the course of the grand jury investigation.

Throughout the course of the grand jury investigation the government widely publicized the names of the individuals and entities that were being investigated as well as the nature of the grand jury's inquiry. The dissemination of information concerning the proceedings before the grand jury was undertaken without the circumspection normally afforded such disclosure by government attorneys. Such disclosures were particularly egregious insofar as the recipients of the information were known customers and business associates of the targets.

With the knowledge of Department of Justice attorneys, numerous letters were sent out identifying the targets, the related entities and the nature of the criminal investigation. The letters were sent to individuals beyond the subpoena power of the grand jury and with whom it was understood the targets had ongoing business and professional relationships. The letters, which were written on the letterhead of the United States Attorney, but signed by supposed agents of the grand jury, were not only misleading in terms of the capacity in which they were sent, but also clearly posed a danger of adversely affecting the acknowledged business and professional relationships. K.Tr. 121-25, 597-98, 969-75; DX V-1 through V-15; DX Y.

The text of the letters read in part as follows:

> *The United States Department of Justice is conducting a Grand Jury investigation of the business activities of William A. Kilpatrick, Declan J. O'Donnell, John Pettingill and Sheila C. Lerner* for the years 1977 through 1980. The Grand Jury is at-

tempting to determine whether these individuals, through United Financial Operations, Inc., P & J Coal Company, Inc., Marlborough Investments, Ltd., International Fuel Development Corp., Ltd., and International Block Construction Company, Ltd., have committed violations of Title 18 and Title 26 of the United States Code.

The Grand Jury has obtained information which indicates that you have had and/or currently do have a business relationship with one or more of the individuals and/or entities listed above. It has been determined that your testimony will be helpful in resolving questions which still face the Grand Jury. Subsequently, the United States Department of Justice cordially invites you to appear and testify before the Federal Grand Jury in Denver, Colorado (U.S.A.) at your convenience. Transportation, lodging and meals will be arranged for and paid by the United States Department of Justice.

• • • • • •

We look forward to your response,

Sincerely yours,

STEPHEN L. SNYDER
Trial Attorney
Criminal Section
Tax Division
By PAUL E. RAYBIN
Special Agent

(emphasis supplied)

The impropriety of publicly identifying targets in these letters was readily apparent to Judge Winner:

> [T]he identity of the persons and the transactions which were under grand jury scrutiny shouldn't be disclosed to anyone by letter or otherwise, but these startling letters did precisely that.

575 F.Supp. at 334.

The prejudicial disclosure of the targets and the nature of the grand jury's investigation, however, was not limited to these "startling letters." During the course of the investigation, the "agents of the grand jury," and other employees of the IRS, ostensibly in connection with the ongoing criminal investigation, interviewed numerous investors in the tax shelters. Those investors, too, were informed of the nature of the grand jury's inquiry and the names of those being investigated. K. Tr. 93-94.

Rule 6(e) imposes upon government attorneys the obligation to secure grand jury information from improper disclosures. That obligation was breached several times. The disclosure of secret grand jury material was not limited to identification of the targets of the investigation. Grand jury information was also shared with Richard Birchall a witness and one-time potential target.[11] Details of the investigation were revealed to Birchall during a meeting in which one of the prosecutors attempted to persuade him to assist in the government's investigation by suggesting that the grand jury had received evidence warranting his consideration as a target. W.Tr.44-52, 983-84; 575 F.Supp. at 332-33.

Moreover, Birchall, who apparently was led to believe that he might face criminal exposure, was left unattended in a room housing grand jury material. He admittedly utilized the opportunity to rummage through the grand jury documents. 575 F.Supp at 332-33. In further disregard of the secrecy provisions of Rule 6(e) another witness, Bernard Bailor noted that the room in which the grand jury material was housed was generally left

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[11] Both government attorney Snyder and agent Mendrop dispute Birchall's testimony. K.Tr. 423-36; 376-89.

open. W. Tr. 1130-31. Judge Winner commented that he found Mr. Bailor's testimony to be knowledgeable and candid during the hearings. 575 F.Supp. at 338-43.

Whatever may be said as to the impropriety of Richard Birchall's rummaging through grand jury testimony and documents when he was left alone in the grand jury storage room, it does not excuse the government attorneys' impropriety in availing him of that opportunity. Before leaving him alone in the grand jury storage room they accused Birchall of making several extortion threats to O'Donnell, a target of the investigation. K.Tr. 377, 381, 422-23, 425-26. Birchall obviously took advantage of the opportunity improperly provided to him to search through the grand jury records and documents.

(4) Improper Imposition of Secrecy Obligations

For what the record reveals was clearly an improper strategic purpose, secrecy obligations in clear violation of Rule 6(e)(2), Fed.R.Crim.P., were imposed upon two grand jury witnesses. On January 5, 1982, David H. Hoff and David R. Major appeared before the grand jury. When Hoff appeared separately before the grand jury he was advised:

> Q: You are also aware that the proceedings of this Grand Jury are secret and that is covered by Rule 6 of the Federal Rules of Criminal Procedure, that is, any questions I put to you today, questions that the Grand Jury may have, any discussion we have in this room at your appearance, that your appearance should be kept secret by you; do you understand that?
>
> A: Yes, sir, I do.

G.J.Tr. Hoff, January 5, 1982, 9:59 a.m., at p. 4. A similar directive was given to David R. Major, G.J.Tr. Major, January 5, 1982, 11:13 a.m., at p. 5.

These confessed violations of Rule 6(e) were neither innocent nor inadvertent. Rather, the record reveals the improper obligation to keep the information and fact of their appearances secret was imposed for a strategic purpose.

Both witnesses occupied positions as attorneys who had formerly represented Defendants Kilpatrick and O'Donnell in previous SEC proceedings involving the same tax shelters under investigation before the grand jury. *See* G.J.Tr. Remarks of Prosecutor, January 5, 1982, 9:09 a.m., at p. 8. The government attorney explained to the grand jury the purpose of calling them as follows:

> The primary focus of our investigation involving the financing is the factual representations made concerning Marlborough Investments Limited, IFDC; we want to know what the lawyers were told by the principals, and what information they relayed to the parties.

G.J.Tr. Remarks of Prosecutor, January 5, 1982, 9:09 a.m., at p. 12. Thus, the government attorney imposed the unauthorized secrecy obligations upon these two witnesses to prevent defendants from determining the nature and extent of any such communication that might have been revealed and to foreclose a challenge to such testimony based upon an applicable privilege.

Such a conclusion is buttressed by the fact that the same government attorney examined four other witnesses that same day, several witnesses two days later on January 7, 1982, and approximately fifteen witnesses on other occasions. *None* of those witnesses were given the same directive. The prosecutors were fully cognizant that Rule 6(e) prohibits the imposition of secrecy obligations on grand jury witnesses.[12]

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[12] *See supra* note 20.

Indeed, during these hearings, the Department of Justice attorney involved acknowledged that at the time he imposed the improper obligations he was aware of the United States Attorneys' Manual provisions prohibiting the imposition of an obligation of secrecy upon a witness. Yet, although provided with ample opportunity, he was unable to offer any legitimate reason for his transgressions. K.Tr. 697-99.

C. Use of Pocket Immunity

During this investigation, Department of Justice attorneys ignored entirely the federal immunity statute (18 U.S.C. §§ 6001, *et seq.*) which prescribes the congressionally authorized procedure for conferring grants of immunity and, instead, secured testimony by engaging extensively in what I have previously described as the "damnable practice" of bestowing "informal immunity" through "letters of assurance." *United States v. Anderson*, 577 F.Supp. 223, 233 [13] (D.Colo.1983). The testimony of 23 witnesses in this investigation was secured by means of such "immunity" conferred by Snyder and Blondin. K.Tr. 513. Not one witness was given statutory immunity.

The profligate issuance of such "letters of assurance" had its inception shortly after the investigation commenced, in a telephone call between one of the prosecutors and Bernard Bailor, Esq., who, with his firm, represented many of the witnesses who later received such letters. K.Tr. 476. Bailor explained that his clients would not testify voluntarily before the grand jury. In response, the prosecutor suggested that in lieu of statutory immunity he would be willing to issue letters of assurance. Mr. Bailor accepted the offer and at that point a pro-

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[13] As discussed later, *see supra* text accompanying note 21, I now believe I was unduly diffident in *Anderson*. The practice is not merely damnable; I believe now that it is clearly illegal.

cedure for issuing the so-called informal "immunity" was inaugurated. K.Tr. 476-77.

After reaching his agreement with Bailor, the prosecutor apparently consulted with senior assistant chief Edward Vellines of the Tax Division. According to the prosecutor, Vellines indicated that the prosecutor had the authority to issue such letters of assurance provided he abided by the instructions of a Department of Justice memorandum *and* the United States Attorneys Manual *and* provided further that the recipient was not a target of the investigation. K.Tr. 514-15; 602; 623.

Thereafter, the prosecutors undertook, without seeking specific approval from any superior, what was characterized as a "liberal" policy of distributing this type of informal immunity to witnesses. At no point was an effort made to obtain statutory immunity for any witness, nor was the United States Attorney's Office for the District of Colorado informed of the issuance of such letters though written on United States Attorney's stationery. K.Tr. 476-77, 720, 731-32; 575 F.Supp.335-36; Remarks of Prosecutor, February 2, 1982 at 1:07 p.m. at p. 5-8; DX U-1-U-17.

No witness who testified pursuant to this form of informal "immunity" bestowed by the prosecutors indicated that he or she would have been less cooperative or unwilling to testify had he or she been granted statutory immunity. Rather, the government attorneys readily concede that they chose the method they did simply for the sake of expediency—to by-pass the review procedure established by Congress in the statutory scheme. K.Tr. 476, 721-22; 724-28. Among the vehicles for review avoided by the unauthorized method chosen here was the statistical compilation that Congress indicated as among its purposes for establishing the statutory procedure. Indeed, the government acknowledged that, unlike grants of statutory immunity on which central rec-

ords are maintained, there is no realistic way for the Department of Justice to determine the number of letters of assurance executed. K.Tr. 729; 839. Despite what the prosecutor explains were his specific instructions, informal immunity was bestowed upon individuals once considered targets of the investigation (*i.e.*, John Jewell and Richard Bell). Moreover, one of the prosecutors admitted having conferred immunity upon an individual who it was later learned had failed to file tax returns for several years. K.Tr. 734-35; *see also* G.J.Tr. Kitrick, May 5, 1981, 10:36 a.m., at p. 3-4; Stephenson, April 6, 1981, 3:01 p.m., at p. 3-4, 575 F.Supp. at 335.

In their deliberate efforts to avoid the review process and the certainty that Congress intended in the granting of witness immunity, the prosecutors injected serious ambiguity in the critical area of witness credibility. Several facts demonstrate the seriousness of the ambiguity created by this unauthorized procedure.

Despite alleged explanations of letters of assurance,[14] the grand jurors whose job it was in this investigation to assess witness credibility were presented with conflicting descriptions of the effect of these letters upon the wit-

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[14] The government's brief, Government's Response to the Bank of Nova Scotia's Proposed Findings of Fact and Conclusions of Law, filed April 9, 1984, at p. 19 provides:

> On February 2, 1982, Mr. Snyder advised the grand jury of his negotiations with Mr. Bailor [attorney for many of the witnesses], and again explained to the grand jury the difference between statutory immunity and letters of assurance. 2/2/82 (1:07 p.m.) G.J. Colloquy 5-14.

The transcript for G.J. Tr. February 2, 1982, 1:07 p.m. presents the testimony of Gordon MacManus. The substance of the testimony consists entirely of an inquiry as to whether Mr. MacManus's attorney was being paid for by Realty Inc. and whether Mr. MacManus would invoke his right against self incrimination. Contrary to the government's assertion, the transcript reflects the prosecutor's attempts to prejudice the grand jury. *See supra* text accompanying note 15.

nesses and, consequently upon the value to place upon their testimony. On some occasions, the witnesses were advised before the grand jury that the letters gave them "immunity" and that they had no Fifth Amendment privilege. *See, e.g.*, G.J.Tr. Stanley, April 6, 1981, 4:27 p.m., at p. 5; Stephenson, April 6, 1981, 3:01 p.m., at p. 4; Kitrick, May 5, 1981, 10:36 a.m., at p. 4; Miller, June 2, 1981, 9:28 a.m., at pp. 3-4. On other occasions, witnesses were advised that although they were testifying after receiving a letter of assurance, they retained their Fifth Amendment privilege and could refuse to testify. *See, e.g.*, G.J.Tr. Jewell, February 4, 1982, 1:19 p.m., at pp. 2-3; Caddell, February 4, 1982, 10:50 a.m., at p. 3; Folsom, April 6, 1982, 11:42 a.m., at p. 4; *see also*, G.J.Tr. Remarks of Prosecutor, February 2, 1982, 1:07 p.m. at pp. 5-8.

Moreover, the prosecutors' avoidance of statutory immunity in this investigation left every witness in the posture of testifying with the impression and fear that unless the witness' testimony pleased the government, the government might withdraw its assurances. That such a fear was more real than imagined was apparent to Judge Winner in his review of the events surrounding the grand jury appearance of Richard Bell, a witness who testified with a "Letter of Assurance."

> Mr. Bell was represented by his brother, Malcolm, an attorney practicing in New York City, and a witness I found to be straight-forward, fair, convincing, and most generous to Mr. Snyder. Malcolm Bell succumbed to the carrot of pocket immunity for his brother, but, later he was told by Mr. Snyder that if Richard 'testified for Mr. Kilpatrick, all bets were off.' Maybe this meant that if Mr. Bell perjured himself he would be prosecuted for perjury, but if the immunity statute had been followed, the nagging question of the meaning of 'all bets are off' wouldn't confront us.

575 F. Supp. at 335.

The meaning of the admonition of the prosecutor was a "nagging question" to Malcolm Bell, who as an experienced attorney ultimately determined that the prosecutor must have meant that the deal was not withdrawn but that Richard Bell was subject to perjury. More significantly, however, Richard Bell, as would most lay witnesses, believed it meant the "Letter" would be withdrawn. T.Tr. 460-63.

D. Witness Invocation of Privilege Against Self-Incrimination

The prosecutors pursued their course of distributing letters of assurance "quite liberally" until, in the words of one of them, it was decided "all good things come to an end." G.J.Tr. Remarks of Prosecutor, February 2, 1982, 1:07 p.m. at p. 5. At that point they replaced the unauthorized procedure with the equally abusive and dubious practice of calling witnesses who had not been issued letters and having them invoke their Fifth Amendment privilege before the grand jury regarding the targets and the transactions under investigation; knowing in advance that they would do so. K.Tr. 515.

In all, seven witnesses were called to invoke their privilege in February and March, 1982. That the purpose was to prejudice the grand jury against the targets and the tax shelter transactions under investigation, and not to lay a statutory predicate for immunizing the witnesses (which the prosecutor never did) cannot be denied. First, the prosecutor who called the witnesses admitted that he did not do so to obtain congressionally authorized grants of immunity. K.Tr. 515. Second, the uniform questions posed to the witnesses evidence the intention to utilize the witnesses assertion to prejudice the grand jurors against the targets:

> Q: Now, Mr. Drizin, if I would ask you any questions concerning any relationship you may or may not have had with William A. Kilpatrick, John Peddingill [sic], Sheila Lerner or Declan J. O'Donnell or United Financial Operations, would you assert your right against self-incrimination on those questions?
>
> A: Yes, sir.

G.J.Tr. Drizin, March 2, 1982, 9:29 a.m., at p. 4. Third, the prosecutor did not limit his questioning merely to have the witness invoke his Fifth Amendment privilege but rather questioned several of the witnesses to elicit that Kilpatrick's company, United Financial Operations, was paying their attorneys' fees, leaving the grand jury with the impression that their refusal to testify was being financed by the targets.[15] *See e.g.*, G.J.Tr. D'Amico, February 4, 1982, 12:35 p.m., at pp. 6-7.

That the prosecutor's conduct in this regard (which occurred before the second of the two grand juries empanelled in connection with this investigation) was known to him to be improper and prejudicial is revealed by his statements to the first grand jury several months earlier:

> Immediately all the witnesses I had subpoenaed today decided that they would not want to come in here and testify and they said they would assert their Fifth Amendment rights.
>
> I could force them in here under their Fifth Amendment rights, but under the Department of Justice guidelines *I should not do that except in exceptional circumstances should I bring a person in here and have them assert their Fifth Amendment rights because it serves no purpose and it only serves to prejudice, and it can prejudice a layman.*

G.J.Tr. Remarks of Prosecutor, February 2, 1981, 9:40 a.m. at pp. 2-3 (emphasis supplied). Indeed, the prosecutor did to the second grand jury precisely what he

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[15] *See supra* note 14.

told the first grand jury he could not and should not do. The only difference is that, when he did it anyway, he did not tell the grand jurors that he was doing it to them. General instructions, months prior, that jurors not draw inferences from an individual's invocation of the privilege against self incrimination cannot correct such corruptions of the grand jury process. G.J.Tr. Remarks of Prosecutor, July 8, 1981, 10:50 a.m., at p. 6; January 5, 1982, 9:09 a.m., at pp. 22-23.

E. Government Summaries of the Evidence

Although the investigation of the instant case covered almost two years, the transcripts reveal that the case against The Bank of Nova Scotia was, for the most part, presented on a single day, September 29, 1982, the day before the indictment was returned. It was done, moreover, almost exclusievly by having Mendrop summarize the "evidence" against the bank. The government seeks to explain these summaries as nothing more than legitimate use of hearsay testimony by the grand jury. *See United States v. Rogers*, 652 F.2d 972, 975 (1981).

During the course of the September 29, 1982 proceedings, the grand jurors expressed concern that The Bank of Nova Scotia was being singled out for prosecution while other banks that allegedly permitted similar banking activity were not being named as defendants. In response, the prosecutor suggested that the Bank of Nova Scotia was a more appropriate target because, unlike the other institutions involved, it was a large internationally known bank doing business in the United States and its prosecution could be expected to deter others. *See* G.J.Tr. Mendrop, September 29, 1982, 9:32 a.m., at p. 50-52. The prosecutor erroneously suggested that the "evidence" indicated that The Bank of Nova Scotia representatives were familiar with the operation of Kilpatrick's business and that the IRS was to be defrauded by virtue of the banking activity. *See* G.J.Tr. Remarks of Prosecutor, September 29, 1982, 8:52 a.m. at pp. 8, 13.

No evidence of the kind suggested by the prosecutor had been presented to the grand jury. The discussion of these points was heard for the first time during the testimony of Mendrop. Instead of being presented as a witness who was to present hearsay investigative information concerning the Bank's role, Mendrop was introduced to the grand jurors as one who was to "summarize" and "just walk through, one more time, and refresh your memory." G.J.Tr. Remarks of Prosecutor, September 29, 1982, 8:52 a.m. at p. 5. Mendrop then proceeded to "summarize the evidence relating to each of the individuals involved" and "the evidence pertaining to The Bank of Nova Scotia." *See* G.J.Tr. Mendrop, September 29, 1982, 9:32 a.m., at pp. 40, 52, 64, 66, 72. On the vital issue of the bank's knowledge and intent, however, it is clear that Mendrop's testimony was both misleading and inaccurate. In particular, Mendrop purported to "summarize" in connection with the bank's role the testimony presented by three witnesses: Messrs. Waters, Ros and Charles. An examination of the grand jury testimony, however, reveals that it was not a summary of the evidence before the grand jury. One of the witnesses whose testimony was "summarized" never appeared before either grand jury. The other two witnesses whose testimony was "summarized" did not give testimony even remotely resembling that supposedly "summarized" by Mendrop. The grand jury was never informed of these mischaracterization or of any alternative basis for Mendrop's summary.

The inaccurate "summaries" of the evidence before the grand jury concerning the role of The Bank of Nova Scotia was particularly abusive for several reasons:

(i) The misleading "summaries were presented by an individual upon whom the grand jurors had been urged to rely as their "agent,"

(ii) The investigation spanned 20 months and two successive grand juries. Much of the testimony of the 27

witnesses who appeared before the first jury was read to the second grand jury in an improper and unsupervised manner,

(iii) The grand jurors had not previously focused on The Bank of Nova Scotia as a target since the bank was not mentioned as a target until the month the indictment was returned;

(iv) The reading of testimony from the first grand jury (which included the testimony of Ros and Charles) occurred early in the presentation of the case to the second grand jury. The grand jurors and the prosecutors frequently commented upon the monotony and difficulty of listening to the readings and, indeed, the grand jurors expressed confusion as to which transcripts had been read. *See, e.g.*, G.J.Tr. Remarks of Prosecutor, November 4, 1981, 9:12 a.m. at p. 5; Remarks of Prosecutor, February 2, 1982, 1:07 p.m. at p. 20; and

(v) The improper summaries related to vital issues concerning the Bank's knowledge and intent. Unbeknown to the grand jurors, the government attorneys contemporaneously entertained serious doubts as to the accuracy of certain critical "facts" contained in the summaries.

In sum, the mischaracterizations reasonably could not have been expected to be picked up by the grand jurors and, undoubtedly, formed a substantial basis for the indictment against the bank. The examples of improper mischaracterizations of the evidence are detailed below.

(1) Mr. Waters

Asserting that he was discussing a "few of the pieces of evidence" and "the summary of the evidence pertaining to The Bank of Nava Scotia," Mendrop purported to summarize what the prosecutor characterized as the "evidence" provided by Waters about a trip supposedly made by defendant Monte Smith, the bank's Cayman Island branch manager, to Kilpatrick's offices in Denver. (Smith

was vital as it is upon his activities that the bank has been claimed vicariously liable.) G.J.Tr. Mendrop, September 29, 1982, 9:32 a.m., at pp. 36, 64, 65-72; *see also* G.J.Tr. Remarks of Prosecutor, September 29, 1982, 9:07 a.m., at p. 10. According to Mendrop and the prosecutor, this claimed trip by Monte Smith was important because it demonstrated that Smith was familiar with Kilpatrick's tax shelter operations. Apparently unbeknown to the grand jurors, Waters never testified before either of the grand juries. The grand juries were never informed of the actual source of Mendrop's testimony which apparently was an interview of Waters or testimony of Waters at a contempt hearing involving Kilpatrick.

Whatever the source, it is clear that Mendrop's supposed "summary" of Waters' testimony is an inaccurate recitation of "facts" in several significant respects. At the time Mendrop was supposedly summarizing the "facts" of Monte Smith's trip to Denver, the government attorneys entertained serious doubts about its accuracy because Waters' description of the individual he met at Mr. Kilpatrick's offices did not resemble Monte Smith.[16] The testimony of Waters during the 1983 obstruction trial of Mr. Kilpatrick confirms the inaccuracies of Mendrop's testimony. During that trial Waters testified that when picking up some checks from Kilpatrick for payment due him, he was informed by Kilpatrick that one of the people present was Mr. Smith who was the manager of the Bank branch on which the checks were drawn. Mr. Waters' description of that individual during trial does *not* resemble Monte Smith. T.Tr. 311-12. In fact, at these hearings, commenting on Mr. Waters' somewhat unusual description of Monte Smith, one of

[16] The government claims that the doubts about the accuracy of Waters' description did not arise until after Mendrop testified. Nevertheless, even under the government's version, such doubts existed months before the indictment. K.Tr. 1067-68.

the prosecutors admitted that at the time "[t]here was a real question as to whether or not it was the same person." K.Tr. 742-43. Despite the facts that Waters was not called as a witness before either grand jury, that the grand jurors were never informed that transcripts of taped interviews of Waters existed and that a "real question" existed as to the accuracy of Waters' identification, Mendrop was permitted to represent to the contrary that there was "considerable confirmation that Mr. Smith did actually come out here and visit with Mr. Kilpatrick." G.J.Tr. Mendrop, September 29, 1982, 9:32 a.m., at pp. 66-68.

(2) Mr. Ros

Raul Ros, a "chauffeur" for Mr. Kilpatrick, testified before the first grand jury. He did not appear before the grand jury that returned the indictment; his testimony was read to the second grand jury. G.J.Tr. Mendrop, September 9, 1981, 8:44 a.m., at p. 3. A year after Mendrop read his testimony to the grand jurors, Mendrop purported to summarize it. According to Mendrop, Ros' evidence confirms the testimony of Waters with regard to Monte Smith's appearance in Denver. G.J.Tr. Mendrop, September 29, 1982, 9:32 a.m., at p. 66. Mendrop indicated that Ros commented that during Smith's claimed visit to Denver, he and Kilpatrick discussed funding for the tax shelters. No such testimony can be found in Raul Ros' grand jury transcript. Mendrop gave absolutely no explanation of an alternative source, but rather erroneously led the grand jurors to believe that he was simply relaying information contained in the Ros testimony before the prior grand jury.

(3) Mr. Charles

Mendrop's "summary" also mischaracterizes the testimony of Barry Charles. Like Raul Ros, Charles testified before the first grand jury not the second grand jury.

As he did with Raul Ros' testimony, Mendrop attributed "testimony" to Charles that the bank fulfilled virtually all of Mr. Kilpatrick's requests and that it "appeared" to Charles that the bank officers knew what was being done. G.J.Tr. Mendrop, September 29, 1982, 9:32 a.m., at p. 68. The "summary" given by Mendrop is at odds with Charles' testimony. G.J.Tr. Charles, June 2, 1981, 8:40 a.m. Again, Mendrop did not identify any alternate source for the comments attributed to Charles.

In his testimony before the first grand jury Charles indicated that he was not present during most of the transactions in the bank. Charles, who traveled to the Cayman Islands with Kilpatrick, Pettingill and O'Donnell, was the least involved in the group and observed less than Oliver Hemphill who himself testified that he had witnessed little of the banking activity. *See* G.J.Tr. Hemphill, May 5, 1981, 9:28 a.m., at p. 12. Thus, Mendrop's suggestion to the grand jurors of the "evidence" to be gleaned from Charles "testimony" is contradicted by the actual testimony of Charles and others.

(4) Comments by the Prosecutor

In addition to presenting Mendrop's summary of the "important evidence" against the bank on the day before the indictment, the prosecutors also argued in favor of an indictment of the bank. Once again, the evidence against the bank on the essential issue of knowledge of the claimed object of the conspiracy was seriously mischaracterized by the prosecutor, who asserted:

> [A]s my agents will tell you there is evidence that the Bank knew it was the IRS—*they were in fact told that it was the IRS they were defrauding.*

G.J.Tr. Remarks of Prosecutor, September 29, 1982, 8:52 a.m. at p. 13 (emphasis supplied). No such evidence was ever presented. Indeed, even the misleading summary of Mendrop provides no basis for such a statement.

F. Interrogation in Absence of Counsel

In February, 1983, during the period between indictment and dismissal of the charges against The Bank of Nova Scotia, one of the prosecutors departed from the traditional role of a government trial attorney in order to travel to Puerto Rico and engage in investigative activity. The prosecutor undertook his journey with the intention of interviewing bank employees concerning the whereabouts and reasons for transfer of another bank employee, Malcolm Haynes, who the prosecutor understood was the second in command at the bank's Cayman Island branch during the period covered by the indictment. No attempt had been made to talk to this potential witness before indictment. The prosecutor's purpose was to interview him concerning matters underlying the indictment. W.Tr. 642-49; 694; 709-10.

Although the prosecutor was fully aware that the bank, an indicted defendant, was represented by counsel, he did not feel constrained by the Supreme Court's dictates in *Massiah v. United States*, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964) to inform counsel of his intentions to interview high ranking bank employees.[17] Instead, he undertook this investigative exercise with the "hope" of eventually interviewing Malcolm Haynes "in the absence of Mr. Morvillo," [18] firm in the belief that,

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[17] The government argues that interviewing Haynes does not give rise to *Massiah* violations because he was only "a potential witness who had information as to the bank's conduct concerning the events charged in the indictment." Government's Response to The Bank of Nova Scotia's Proposed Findings of Fact and Conclusions of Law, filed April 9, 1984, at p. 37. The government ignores *Massiah* because Haynes was not individually named as a defendant in the indictment. *Id.* Nevertheless, the government does recognize that Haynes "was the number two man in the Cayman Island branch of The Bank of Nova Scotia at the time of the events in question." *Id.* quoting W.Tr. 653.

[18] Mr. Morvillo is the bank's lead defense counsel.

if he committed a constitutional violation of the type identified in *Massiah*, the only likely sanction was the suppression of evidence in the government's case-in-chief. In the prosecutor's words, "no indictment has ever been dismissed because of [a *Massiah* violation]." K.Tr. 1114, 1122; W.Tr. 643, 693-94, 709-10.

The prosecutor also testified that he believed it was permissible to interview high ranking employees of an indicted corporate defendant because it was authorized in *Upjohn Co. v. United States*, 449 U.S. 383, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981) and because, unlike *Massiah* he was not engaged in acts of "subterfuge." [19] W.Tr. 643, 693-94, 709-10; K.Tr. 1114-15.

When he arrived in Puerto Rico, the prosecutor and another investigator, Victor Torrez Perez, an IRS special agent, appeared without prior arrangement at the branch offices of The Bank of Nova Scotia and proceeded to interrogate several of its representatives. Among others, they questioned Malcolm Haynes' former secretary and his replacement, the branch's controller. They also interrogated other high ranking representatives of the bank—including Douglas Rector, the Puerto Rico area manager of The Bank of Nova Scotia and chief executive officer of the Bank's Puerto Rico subsidiary. W.Tr. 640-42, 696-99.

After leaving the bank, accompanied by Special Agent Torrez Perez, he searched out the school attended by Haynes' two small daughters, ages eight and ten, in order to determine the whereabouts of their parents. At the end of the school day, the prosecutor (who had already elicited information from the school's principal and the girls' teachers) followed the children on foot "by about a hundred yards." His purpose was to have the girls lead him to their mother. W.Tr. 642-45; 699-708.

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[19] *See supra* note 23.

The prosecutor's visit to Puerto Rico, however, did not end his endeavor to interrogate high ranking representatives of the defendant bank without notice to or leave of defense counsel. Shortly after his interrogation of Mrs. Haynes, he wrote a letter to her requesting that she use her efforts to have her husband speak with the government. Like his previous efforts this approach was made without informing defense counsel. Indeed, the prosecutor asserted that he "would have interviewed Mr. Haynes in the absence of Mr. Morvillo hopefully." W.Tr. 709-10.

G. Mistreatment of Witnesses

Professor Roland Hjorth, a tax law professor who Judge Winner observed "is a recognized expert who was employed by defense counsel" was permitted to testify before the grand jury that returned the indictment. His treatment by the prosecutor on the occasion of his appearance contrasts markedly with the treatment the prosecution afforded its own expert, Roger Schneider, who was passed off as an "agent of the grand jury."

As Judge Winner observed:

> [Professor Hjorth's] views of tax law differed markedly from those of [the prosecutor], who bragged on frequent occasions that he had never taken a course in taxation and knew almost nothing about it. Nevertheless, Professor Hjorth was browbeaten and ridiculed by [the prosecutor], and some of the conversation so out of place for an ethical prosecutor took place during a recess in the hearing of some grand jurors.

575 F.Supp. at 333.

Indeed, the prosecutor's heated argument with Professor Hjorth was also overheard by witnesses scheduled to appear before the grand jury. W.Tr. 334. Moreover, the conduct was so shocking that Richard Slivka, a local attorney formerly employed by the Department of Justice

and Colorado United States Attorney's Office, who was representing witnesses scheduled to appear and who himself observed the conduct, wrote a letter to Chief Judge Finesilver shortly thereafter reporting the incident. W.Tr. 317-27; 350-64. Professor Hjorth testified that the prosecutor's conduct was so abusive that he would never again appear as an expert witness in a similar proceeding.

Judge Winner concluded of the prosecutor's conduct that:

> Intimidating witnesses by telling them that their testimony disgraces them and implying that the Tax Division of the Department of Justice will take after the witness and will complain to the University of Washington Law School because an expert testified to his expert opinions does no credit to our government. . . . [s]eemingly, the professor's testimony isn't seriously contested. I hope that we haven't gotten to the point that disagreement with the legal concepts of the IRS provide grounds for attacks by that bureaucracy because sometimes the IRS is wrong. *U.S. v. Sells Engineering*, 463 U.S. 418, 103 S.Ct. 3133, 77 L.Ed.2d 743 and *U.S. v. Baggot*, 463 U.S. 476, 108 S.Ct. 3164, 77 L.Ed.2d 785.

575 F.Supp. at 333; *see also* K.Tr. 502-05.

CONCLUSIONS OF LAW

The government's position in this case is reminiscent of the common law defense of confession and avoidance in which, for the most part, the truth of the averments of fact are admitted, but argument is made which tends to deprive the facts of their ordinary legal effect or obviates them. Thus, it is said:

> Just as there has never been a perfect lawyer, a perfect judge, or perfect trial, so has there never been a perfect investigation. Contrary to what one

> might expect, in view of the defense allegations, the transcripts of the grand jury proceedings do not reveal any conduct whatsoever by the prosecutors seeking to overreach or override the independence of the grand jury.

Government Memorandum, Government Response to The Bank of Nova Scotia's proposed Findings of Fact and Conclusions of Law, filed April 9, 1984, at pp. 3-4. The government's response to the defendants' several proposed findings of facts is mainly a recitation of the number of instances in which its prosecutors did not violate the law.

As I view the present state of the law as it applies to this case, there are four analytical modalities which must be considered. In the first, specific violations of specific rules require dismissal. I view this form of analysis as essentially quantitative. There either is a violation or there isn't and the conclusion is ineluctable depending on the factual premise which is established. The second modality, requires an evaluation of the totality of circumstances extant so that a qualitative assessment may be made. Finally, cases distinguish the third modality, the authority and duty of district courts to supervise the conduct of prosecutions and grand juries, from the fourth modality, the duty to enforce the mandates of the Constitution.

In articulating the conclusion of law I have reached in this case, I shall consider all four modalities in the order in which I have just expressed them. I shall begin with Rule 6, Fed.R.Crim.P.

A. Violations of Rule 6(d)

As noted by Judge Winner, Rule 6, Fed.R.Crim.P. does not authorize grand juries to have agents. The creation of that role and its misleading description to the grand jury is an improper intrusion into the exclusive and independent province of the grand jury by government attorneys and investigators. The most important function of the grand jury is to stand between the government agents and the suspect as an unbiased evaluator of the evidence. *United States v. Dionisio*, 410 U.S. 1, 16-17, 93 S.Ct. 764, 772-773, 35 L.Ed.2d 67 (1973). "The purpose of the grand jury requires that it remain free, within constitutional and statutory limits, to operate independently of either prosecuting attorney or judge." *United States v. Sells Engineering, Inc.*, 463 U.S. 418, 103 S.Ct. 3133, 3141, 77 L.Ed.2d 743 (1983).

Rule 6(d), Fed.R.Crim.P., delimits those who may be present in grand jury proceedings by the following explicit language:

> (d) Who May Be Present. Attorneys for the government, the witness under examination, interpreters when needed and, for the purpose of taking the evidence, a stenographer or operator of a recording device may be present while the grand jury is in session, but no person other than the jurors may be present while the grand jury is deliberating or voting.

After his usual thorough analysis of the relevant case law and with characteristic pungency, Judge Matsch, of our Court, stated in *United States v. Pignatiello:*

> A review of all of these cases reinforces the conclusion that the only effective sanction for a violation of Rule 6(d) is dismissal without any further inquiry into the effects of that violation.

582 F.Supp. 251, 254 (D.Colo.1984).

> I conclude that events which occurred in the grand jury room while *soi-disant* agents of the grand jury were present and not under oath as witnesses under examination violated Rule 6(d) and therefore require dismissal of the indictment. As Judge

Matsch carefully notes in *Pignatiello*, brief intrusions on the proceedings during which no testimony is taken nor questions asked nor statements made about the case by grand jurors such as the delivering of a note to the prosecutor by his secretary or the repair of a switch by a maintenance man are not included within the *per se* rule. In this case, there is no doubt that matters of considerable substance occurred while Rule 6(d) was being violated.

B. Violations of Rule 6(e)

Courts have held that violations of the strictures of Rule 6(e), Fed.R.Crim.P., typically require the sanction of contempt rather than dismissal. *United States v. Hoffa*, 349 F.2d 20, 43 (6th Cir. 1965). However, where Rule 6(e) is violated recklessly and systematically, dismissal is appropriate. *United States v. Gold*, 470 F. Supp. 1336, 1352-56 (N.D.Ill. 1979). Where knowing violations of Rule 6(e) prejudice and embarrass targets whose identities the government reveals, the government itself has recognized that the contempt remedy is "*not always* . . . wholly adequate." United States Attorneys' Manual § 9-11.370 (emphasis supplied).

(1) *Rule 6(e)(3)—Improper Disclosure and Use*

Rule 6(e)(3) provides in relevant part:

(3) Exceptions.

(A) *Disclosure otherwise prohibited* by this rule of matters occurring before the grand jury, other than its deliberations and the vote of any grand jury, *may be made to*—

(i) an attorney for the government for use in the performance of such attorney's duty; and

(ii) *such governmental personnel as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law.*

(B) Any person to whom matters are disclosed under subparagraph (A)(ii) of this paragraph shall not utilize that grand jury material for any purpose other than assisting the attorney for the government in the performance of such attorney's duty to enforce federal criminal law. *An attorney for the government shall promptly provide the district court, before which was impaneled the grand jury whose material has been so disclosed, with the names of the persons to whom such disclosure has been made.*

(emphasis supplied).

The prosecutors in this case permitted several violations of this rule. They relinquished to the IRS their responsibility to determine the persons to whom disclosure would be made. The IRS agents then failed to provide the "prompt" notification of such disclosure mandated by the rule. Moreover, the IRS representatives, in direct contravention of recent Supreme Court dictates, improperly manipulated the secret material and their novel roles as "agents of the grand jury" to obtain information and data for use during civil litigation that they knew would follow on the heels of the criminal case. *See United States v. Sells Engineering, Inc., supra, United States v. Baggot*, 463 U.S. 476, 103 S.Ct. 3164, 77 L.Ed.2d 785 (1983).

Rule 6(e)(3) provides that disclosure can be made to "such government personnel as are deemed necessary by an attorney for the government . . ." provided the "attorney for the government . . . promptly provide[s] the district court . . ." with notice of such disclosure. The instant record reveals not only that IRS representatives regularly took it upon themselves to determine to whom disclosure should be made, but also that in some cases the "attorneys for the government" were not notified of

such disclosure until after it had occurred, if they were notified at all. Moreover, notices to the district court were not filed promptly but were prepared in some instances substantially after such disclosure, even after the investigation had concluded and the indictment was filed.

With regard to the delegation of the Rule 6(e)(3) responsibilities in this investigation by Department of Justice attorneys, Judge Winner noted:

> I am troubled about testimony suggesting that authority to make the disclosure decisions was delegated to the IRS Special Agent/Grand Jury Agents/Prosecutor's helpers. Under common law rules of agency, this authority couldn't be delegated to a subagent, and especially it couldn't be delegated to an IRS agent whose fellow workers were aiming at the defendants from a different angle. My worry on this score is not lessened by an IRS letter in evidence saying that making a civil tax case under the administrative process would be difficult. *United States v. Sells Engineering* and *United States v. Baggot*, both *supra*, which settle the question of using a grand jury to collect taxes.

575 F.Supp. at 5 (1983).

The broad delegation to the IRS of control over the course of the grand jury investigation is amply supported by the record. The extensive disclosure of grand jury material to IRS civil employees, the haphazard and *post hoc* method of identifying those to whom disclosure was made and the omission from the disclosure notices of numerous IRS employees privy to grand jury information clearly contravene the rule. It is fanciful to suggest that these IRS and civil employees will erase from their minds that material obtained as part of the grand jury's investigation.

In *United States v. Sells Engineering, Inc.*, *supra*, the Supreme Court recognized that it is difficult or impossible

to demonstrate the extent of improper disclosure and use of grand jury material made during the course of an investigation. *Id.* 103 S.Ct. at 3142. In the instant case a significant portion of the direction of the investigation was unrelated to the federal criminal goals. As the Supreme Court observed:

> [B]ecause the Government takes an active part in the activities of the grand jury, disclosure to government attorneys for civil use poses a significant threat to the integrity of the grand jury itself. If prosecutors in a given case knew that their colleagues would be free to use the materials generated by the grand jury for a civil case, they might be tempted to manipulate the grand jury's powerful investigative tools to root out additional evidence useful in the civil suit. . . .

Id.

In *Sells* the Supreme Court analyzed the grand jury process and the provisions of Rule 6(e) in deciding whether civil division lawyers in the Department of Justice should have automatic access to grand jury materials to assist them in civil litigation. The court denied such access for three reasons: (1) civil disclosure threatens to subvert the limitations otherwise imposed on the government's powers in civil and administrative discovery and investigation; (2) civil disclosure may tempt prosecutors to manipulate the grand jury investigation to obtain evidence useful in civil litigation; and (3) civil disclosure increases the number of persons privy to grand jury matters thereby increasing the risk of inadvertent or illegal disclosure to others. *Id.* at 3142, 43. The IRS's participation in the grand jury investigation in this case achieved each of these illicit purposes.

As noted by Judge Winner, the genesis of the grand jury's inquiry was a belief by the IRS that it could not effectively investigate the facts underlying the subject

tax shelters pursuant to its congressionally circumscribed administrative enforcement powers. Thus, the extraordinary powers of the grand jury were sought and usurped.

(2) *Rule 6(e)(2)—Secrecy Violations*

Rule 6(e)(2), Fed.R.Crim.P. provides:

> (2) General Rule Of Secrecy.—A Grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under paragraph (3)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of Rule 6 may be punished as a contempt of court.

Rule 6(e)(2) is a codification of the traditional requirement that matters occurring before the grand jury should be treated as confidential. Courts have consistently recognized that this traditional requirement exists to no small degree in order to protect the name and reputation of the targets during the pendency of the period the allegations are being investigated. *See e.g., United States v. Malatesta*, 583 F.2d 748, 752 (5th Cir.1978), *cert. denied*, 444 U.S. 846, 100 S.Ct. 91, 62 L.Ed.2d 59 (1979). Thus, courts have held that Rule 6(e) prohibits the government from publicly identifying the targets of a grand jury's inquiry. *See In re Bart*, 304 F.2d 631, 637 n.19 (D.C.Cir.1962); *Hawthorne v. Director of Internal Revenue*, 406 F.Supp. 1098, 1128-29 (E.D.Pa. 1975).

During the course of this investigation the government repeatedly and systematically disclosed the identity of the targets to individuals and entities that the government acknowledged had a "business relationship" with the targets and to investors identified as customers of the targets. These numerous disclosures adversely affected the business activities of the targets at a time when the grand jury was charged with investigating whether any crimes may have been committed. The abuse of power is evident.

The violations of Rule 6(e)(2) do not end with the improper violations of the secrecy requirements. In order to gain a tactical advantage, prosecutors selected two witnesses and directed them not to disclose the fact or substance of their testimony. As Judge Winner held, this was done in direct contravention of Rule 6(e)(2):

> [The imposition upon witnesses of secrecy obligations] is now verboten because of the language of the rule saying, 'No obligation of secrecy may be imposed on any person except in accordance with this rule.' This language has been uniformly interpreted to prohibit any instruction to a witness that his testimony is secret. *In re Langswager*, (1975) D.C. Ill. 392 F.Supp. 783; *In re Grand Jury Witness Subpoenas* (1974) D.C.Fla. 370 F.Supp. 1282; *In re Alvarez* (1972) D.C.Cal. 351 F.Supp. 1089; *In re Minkoff* (1972) D.C.R.I. 349 F.Supp. 154; *In re Investigation before April 1975 Grand Jury* (1976) D.C.Cir. 531 F.2d 600; *In re Vescovo Special Grand Jury* (1979) 473 F.Supp. 1335, and many other cases. In spite of this express command of Rule 6(e), secrecy obligations were imposed on several witnesses, and, to make the violation more disturbing, secrecy obligations were imposed on lawyers called to furnish information concerning their clients. That makes the violation gravely beyond the pale, because of the impossible position the lawyer-witness is placed in, but that's what the grand jury transcript discloses. No 'oath' of secrecy was adminis-

tered, but an obligation of secrecy was imposed by instructions from government counsel to witnesses. This foolishness may or may not have been intentional, but ignorance of the law is not a defense available to a prosecutor. *This misconduct is established by the record, and it will prove difficult for the government to deny,* just as the government had to admit the attempted administration of an 'oath' by Mr. Snyder. The government surprisingly defends the proven mishmash of functions of the IRS Special Agent/Grand Jury Agents/Assistants to the Attorney for the Government appointed under Rule 6(e), but maybe it thinks that admitting that this was error would confess the motion to dismiss.

575 F.Supp. at 331, 332 (1983); *see also United States v. Radetsky*, 535 F.2d 556, 569 (10th Cir.), *cert. denied*, 429 U.S. 820, 97 S.Ct. 68, 50 L.Ed.2d 81 (1976); *Application of Eisenberg*, 654 F.2d 1107, 1113 n.9 (5th Cir. 1981); *In re Russo*, 53 F.R.D. 564, 570 (C.D.Ca.1971); *In Re Disclosure of Evidence*, 184 F.Supp. 38, 41 (E.D. Va.1960); *Arlington Glass Co. v. Pittsburgh Plate Glass Co.*, 24 F.R.D. 50, 52 (N.D.Ill.1959).

As Judge Winner suggests, the only issue that could not be determined by the record before him was whether the secrecy obligations were imposed intentionally. The prosecutor's testimony during the hearings before me, however, leaves no doubt that the improper obligation was imposed deliberately, with full knowledge of the witness's relationship to the targets and in violation of the commands of the United States Attorneys' Manual.[20]

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[20] The United States Attorneys' Manual provides at § 9-11.362:

> Rule 6(e) specifically prohibits any obligation of secrecy from being imposed 'upon any person except in accordance with this rule.' Witnesses, therefore, cannot be put under any obligation of secrecy. *Application of Eisenberg*, 654 F.2d 1107, 1113 n. 9 (5th Cir. 1981). This, however, should not prevent the grand jury foreman from requesting a witness not to make unnecessary disclosures when those disclosures or the attendant publicity might hinder an investigation.

Moreover, no legitimate explanation for the activity was ever presented.

The numerous violations of Rule 6(e) by the Department of Justice attorneys ignore the rights of uninjected subjects of an investigation and the secrecy and independence of the grand jury itself. As I shall discuss later, a court's supervisory power to dismiss an indictment is appropriately utilized to ensure that governmental impropriety of a similar nature is not repeated in future investigations or prosecutions. *United States v. Owen*, 580 F.2d 365, 367 (9th Cir.1978); *United States v. Houghton*, 554 F.2d 1219, 1224 (1st Cir.), *cert. denied*, 434 U.S. 851, 98 S.Ct. 164, 54 L.Ed.2d 120 (1977). Dismissal is particularly appropriate in order to hold all government prosecutors acting within this district to the same high standard of conduct that the United States Attorney demands of his own assistants. *United States v. Jacobs*, 547 F.2d 772, 778 (2d Cir.1976) (Organized Crime Strike Force attorney operating in the Eastern District of New York); *United States v. Gold*, 470 F. Supp. 1336 (N.D. Ill. 1979) (Environmental Protection Agency Staff attorney appointed as Special Attorney in the Department of Justice); *see also United States v. Estepa*, 471 F.2d 1132, 1137 (2d Cir.1972).

As previously indicated, however, I hold that where violations of Rule 6(e) are intentional or reckless and systemic, the sanction of contempt is insufficient and dismissal of the indictment is warranted. Under such circumstances, it is not necessary for the defendant to show that he has been prejudiced by the violations. In the instant case, however, such showing of prejudice has been convincingly made.

C. Violations of Witness Immunity Statutes

Earlier in this opinion,[21] I indicated that I believe I was unduly diffident in describing so-called pocket immunity or "Letters of Assurance" as a "damnable practice." I believe I was wrong because I did not then have the benefit of the Supreme Court's opinion in *United States v. Doe*, —— U.S. ——, 104 S.Ct. 1237, 79 L.Ed.2d 552 (1984).

In *Anderson v. United States*, *supra*, I wrote:

> The government, in this case, made extensive use of informal or 'pocket' immunity granted to a witness by letter or oral representation of the prosecutor rather than ordered by a judge after satisfaction of the procedures of 18 U.S.C. §§ 6002 and 6003. Such immunity poses serious problems since it circumvents the statute and leaves an inadequate record of the scope of the immunity granted. *See, United States v. Quatermain, Drax*, 613 F.2d 38 (3rd Cir. 1980). The procedures established by Congress in 18 U.S.C. §§ 6002 and 6003 clearly indicate an intent to formalize, standardize and limit the use of immunity. The statute requires approval of a senior Justice Department official as well as application to and order of a United States District Court Judge before immunity is conferred. The procedure leaves no doubt as to the accomplishment of the grant, the particularized need of the witness and the scope of the immunization. It also leaves for Congress and the public a complete and definite record of the frequency, efficacy and reasons for the use of immunity. Informal immunity, apparently in widespread use by the Justice Department, accomplishes none of those goals. It is a damnable practice. No notice need be given to senior Justice Department officials or to a judge. The only record, if any, is a letter by the U.S. Attorney or a transcript of an oral representation, if it was made on the record. Such informality has resulted in confusion over witnesses rights in the past, *Quatermain, Drax, supra*, 613 F.2d 38, and lends itself to excessive use of unchecked discretion. While the immunity grant is always a matter of prosecutorial discretion, the procedures of §§ 6002 and 6003 subject it to the light of public, congressional and judicial scrutiny and insure that it is not invoked or revoked arbitrarily or capriciously.

[21] *See supra* note 13.

In *United States v. Doe*, Justice Powell wrote:

> As we stated in *Pillsbury Co. v. Conboy*, 459 U.S. 248, 74 L.Ed.2d 430, 103 S.Ct. 608 (1983), in passing the use immunity statute, 'Congress gave certain officials in the Department of Justice exclusive authority to grant immunities.' *Id.*, at 253, 74 L.Ed.2d 430, 103 S.Ct. 608 [at 612]. 'Congress foresaw the courts as playing only a minor role in the immunizing process: . . .' *Id.*, at 254, n.11, 74 L.Ed.2d 430, 103 S.Ct. 608 [at 613]. The decision to seek use immmunity necessarily involves a balancing of the Government's interest in obtaining information against the risk that immunity will frustrate the Government's attempts to prosecute the subject of the investigation. *See United States v. Mandujano*, 425 U.S. 564, 575, 48 L.Ed.2d 212, 96 S.Ct. 1768 [1776] (1976) (plurality opinion). Congress expressly left this decision exclusively to the Justice Department. If, on remand, the appropriate official concludes that it is desirable to compel respondent to produce his business records, the statutory procedure for requesting use immunity will be available.

—— U.S. at ——, 104 S.Ct. at 1244-45, 79 L.Ed.2d at 562-63.

It thus can be seen most clearly that Congress has vested exclusive authority to grant immunities in a few specified officials in the Department of Justice. Further, Congress has clearly and unequivocably set forth the parameters within which that discretion must be exercised. Ordinary statutory construction employing the principle of *expressio unius est exclusio alterius* and buttressed by the quoted language of Justice Powell leads to only one conclusion: Pocket immunity is illegal; when granting immunity, the Department of Justice must comply with the requirements of 18 U.S.C. §§ 6002 and 6003.

I hold that the repeated use of letters of assurance or so called "pocket immunity" in the instant case violated the applicable statutes and tainted the grand jury indictment with its illegality.[22]

D. Violations of the Fifth Amendment

Courts have consistently held that it is improper to call a witness solely for purposes of having that witness assert their rights under the Fifth Amendment when the prosecutor is aware of the witnesses' intention to do so. *See Namet v. United States*, 373 U.S. 179, 186, 83 S.Ct. 1151, 1154, 10 L.Ed.2d 278 (1963); *United States v. Ritz*, 548 F.2d 510, 521 (5th Cir. 1977); *United States v. Maloney*, 262 F.2d 535, 537-38 (2d Cir. 1959). The facts here demonstrated that the prosecutor hoped to take advantage of impermissible inferences that arise from invocation of the privilege. *See United States v. Maloney*, 262 F.2d 535 (2d Cir. 1959). The prosecutor's

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[22] The conventional remedy for illegal use of "pocket immunity" would, in most instances, take the form of a *post facto* grant of statutory immunity or the equitable enforcement of the pocket agreement, for the benefit of grand jury witnesses who relied on the prosecutor's promises. These concerns are not before me here. Still, the use of pocket immunity was so pervasive in this case that it reflects upon the general conduct of the prosecutors and the grand jury.

ploy "served no other purpose than calculated prejudice." *United States v. Samango*, 607 F.2d 877, 883 (9th Cir. 1979).

Moreover, the improper efforts to prejudice the defendants by impermissible inferences flowing from the seven witnesses' assertions of their privilege against self-incrimination was compounded by the questioning concerning the payment of the witnesses' legal fees. No legitimate purpose for such questioning exists. Indeed, siimlar questioning before a grand jury has been held to be improper. *United States v. Gold*, 470 F. Supp. 1336, 1352 (N.D. Ill. 1979).

Dismissal of an indictment is not required *per se* by the deliberate contriving of a prosecutor to have witnesses invoke their Fifth Amendment privilege. Such conduct is, however, a factor to be considered in the totality of circumstances in determining whether a grand jury has been overreached or usurped.

E. Presentation of Misinformation

The mischaracterization of the testimony before the grand jury and the unidentified use of questionable hearsay information with regard to vital issues intrudes upon the independent role of the grand jury. *See United States v. Samango*, 607 F.2d 877 (9th Cir. 1979). The court in *Samango* emphasized that such behavior, even if unintentional, causes "improper influence and usurpation of the grand jury's role." *United States v. Samango*, 607 F.2d at 882. Such a danger is particularly present where, as here, the misrepresentations could not be expected to be readily apparent to the second grand jury and related to material issues in the prosecution. *See id.* at 883; *United States v. Lawson*, 502 F. Supp. 158 (D. Md. 1980) (indictment dismissed where prosecutor's examination of witness created a false impression and misled grand jurors as to nature of the evidence); *United*

States v. Gallo, 394 F. Supp. 310 (D. Conn. 1975) (indictment dismissed where grand jurors misled as to hearsay nature of testimony and misstatements).

F. Violations of the Sixth Amendment

It is beyond cavil that, upon indictment, a defendant becomes an "accused" with a right to counsel guaranteed by the Sixth Amendment. *See Brewer v. Williams*, 430 U.S. 387, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977); *Massiah v. United States*, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964). The guarantees of the Sixth Amendment apply to corporate defendants with the same force as to individual defendants. *United States v. Rad-O-Lite of Philadelphia, Inc.*, 612 F.2d 740, 743 (3d Cir. 1979); *see also Grandbouche v. Adams*, 529 F. Supp. 545, 547 (D. Colo. 1982). In order to give meaning to these guarantees, the Supreme Court has held that once a defendant becomes an accused, it is improper for a government official to question that defendant out of the presence of counsel. *Brewer v. Williams, supra*; *Massiah v. United States, supra.*

In the instant case, the Department of Justice engaged in precisely the type of interrogation proscribed by the Supreme Court.[23] Without notifying counsel for

[23] The prosecutor's *post hoc* rationalizations attempting to demonstrate the propriety of his conduct do the opposite. *See supra* text accompanying note 18. *Upjohn Co. v. United States*, 449 U.S. 383, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981) establishes that corporate employees of the kind interrogated here fall within the ambit of the attorney-client relationship and must be considered, in essence, the corporation for purposes of communications. Indeed, while the Supreme Court in *Upjohn* noted that instead of procuring interview notes of the corporation's attorneys, counsel for the government might themselves question employees about relevant events, the facts of that decision give no indication that questioning would be proper if conducted behind counsel's back. Rather, the opinion indicated that questioning would occur with appropriate procedural safeguards. Moreover, *Upjohn* was not a criminal case and the corporation had not been indicted. Thus, *Massiah* and its progeny, of course, were inapplicable. Indeed, the facts and relevance of *Upjohn* are so inapposite as to raise questions as to the sincerity of its invocation.

The prosecutor also relied upon *Diversified Industries, Inc. v. Meredith*, 572 F.2d 596 (8th Cir. 1977) as support for its position. That case too dealt with civil litigation and the question of attorney client privilege with a corporate client. The case did not concern post-indictment activity by prosecutors.

The prosecutor's second *post hoc* rationalization that *Massiah* did not restrict his interrogation because he did not employ subterfuge requires little discussion. The Supreme Court did not base its holding in *Massiah* upon the use of subterfuge. Rather, that opinion was premised on an accused's right to counsel. Thus, in *Brewer v. Williams*, the Supreme Court specifically noted that the fact that "the incriminating statements were elicited surreptitiously in the *Massiah* case, and otherwise here, is constitutionally irrelevant." *Brewer v. Williams*, 430 U.S. at 400, 97 S.Ct. at 1240.

the indicted bank, the prosecutor along with a federal agent, impermissibly interrogated several high level bank employees in hopes of obtaining incriminating information. In several respects the instant conduct is even more egregious than that which occurred in *Brewer* and *Massiah*. The prosecutor's actions here were premeditated and prompted by the expectation that the worst that would become of his constitutional violations would be a limited suppression of evidence.[24]

[24] Unlike the situations in *Brewer* and *Massiah*, the interrogation of the bank's representatives was conducted not by an investigatory agent, but primarily by an attorney involved in the prosecution also calling into question a possible violation of that attorney's ethical obligations.

Disciplinary Rule 7-104 of the Code of Professional Responsibility provides in relevant part:

> *Communicating With One of Adverse Interest.*
>
> (A) During the course of his representation of a client a lawyer shall not:
>
> (1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior

The defendants have not, however, demonstrated any prejudice from the interrogations of bank employees in the absence of counsel. The bank's counsel has performed ably and adequately throughout the litigation. Under such circumstances, the Supreme Court has specifically rejected the remedy of dismissal based upon a prosecutor's violation of a defendant's Sixth Amendment rights. "[A]bsent demonstrable prejudice or substantial threat thereof, dismissal of the indictment is plainly inappropriate, even though the violation may have been deliberate." *United States v. Morrison*, 449 U.S. 361, 365, 101 S.Ct. 665, 668, 66 L.Ed.2d 564 (1981). *See also United States v. Drake*, 655 F.2d 1025, 1027 (10th Cir. 1981); *United States v. Kapnison*, 743 F.2d 1450 at 1454 (10th Cir. 1984. As in *Morrison*, so it is here:

> [Defendant] has demonstrated no prejudice of any kind, either transitory or permanent, to the ability of [its] counsel to provide adequate representation in these criminal proceedings. There is no effect of a constitutional dimension which needs to be purged to make certain that [defendant] has been effectively represented. . . .

449 U.S. at 366, 101 S.Ct. at 669. Accordingly dismissal of the indictment is an inappropriate remedy for the *Massiah* violations in this case.[25]

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consent of the lawyer representing such other party or is authorized by law to do so.

See United States v. Thomas, 474 F.2d 110, 111-12 (10th Cir.), *cert. denied*, 412 U.S. 932, 93 S.Ct. 2758, 37 L.Ed.2d 160 (1973). *Cf. Ceramco, Inc. v. Lee Pharmaceuticals*, 510 F.2d 268 (2d Cir. 1975).

[25] The prosecutor's interrogation and surveillance here is precisely the type of deliberate governmental impropriety that should be discouraged. *See United States v. Owen*, 580 F.2d 365, 367 (9th Cir. 1978), *citing Elkins v. United States*, 364 U.S. 206, 80 S.Ct. 1437, 4 L.Ed.2d 1669 (1960); *United States v. Houghton*, 554 F.2d 1219, 1224 (1st Cir. 1977), *cert. denied* 434 U.S. 851, 98 S.Ct. 164, 54 L.Ed.2d 120. Insofar as the prosecutor by his own admission was not deterred by the possibility of other available remedies, dismissal remains the only viable prophylactic tool. The Supreme Court has gone to great lengths to explain that the good faith efforts of law enforcement officials should not be overcome by technicalities beyond their control. *See United States v. Leon*, —— U.S. ——, 104 S.Ct. 3430, 82 L.Ed.2d 677 (1984). The apposing proposition requires that effective sanctions be imposed to prevent deliberate constitutional violations by law enforcement officials. Constitutional protections are of little value if violations are permitted without the imposition of meaningful sanctions. *See Mapp v. Ohio*, 367 U.S. 643, 655, 81 S.Ct. 1684, 1691, 6 L.Ed.2d 1081 (1961); *Elkins v. United States*, 364 U.S. 206, 217, 80 S.Ct. 1437, 1444, 4 L.Ed.2d 1669 (1960). Here, the prosecutor's premeditated interrogation of bank employees behind the back of the bank's counsel plainly violated the Sixth Amendment protections outlined by the Supreme Court in *Massiah* and *Brewer*.

The Sixth Amendment abuses were, in some instances, undertaken by the prosecutors appearing before the grand jury. Thus, while not directly implicating actions by the grand jury, such actions do reflect upon the general abuses of the grand jury process practiced by the government. The *Massiah* violations must enter into my general qualitative assessments of the prosecutors' and grand jury's conduct.

G. The Totality of Circumstances Test

As I stated in *United States v. Anderson*, 577 F.Supp. 223, 230 (1983):

> The Tenth Circuit Court of Appeals has recently articulated the standard to be applied in cases where dismissal of an indictment is sought because of prosecutorial misconduct:
>
> > An indictment may be dismissed for prosecutorial misconduct which is flagrant to the point that there is some significant infringement on the grand jury's ability to exercise independent judgment.

United States v. Pino, 708 F.2d 523, 530 (10th Cir. 1983). While the remedy of dismissal is extraordinary, it may be used 'to insure proper standards of conduct by the prosecution.' 708 F.2d at 530. District courts are also empowered to dismiss indictments because of inherent supervisory powers which protect the integrity of the judicial system. 708 F.2d at 531. Isolated errors and improprieties do not require dismissal of the indictment. It is only when the government engages in deliberate conduct which interferes with the grand jury's independent function or damages the integrity of the judicial process that the remedy of dismissal becomes necessary. Because I find that the government engaged in a pattern of conduct calculated to infringe the grand jury's ability to exercise independent judgment, the indictments must be dismissed.

• • • • • •

The grand jury is more than a symbol of the limitations the constitution places on the government's power. When the government usurps the grand jury and destroys its independence so that it looks and acts like an arm of the prosecution, the very essence of a government of limited powers is destroyed. *See, United States v. Dionisio*, 410 U.S. 1, 17, 93 S.Ct. 764, 773, 35 L.Ed.2d 67 (1973); *Stirone v. United States*, 361 U.S. 212, 80 S.Ct. 270, 4 L.Ed.2d 252 (1960).

In *United States v. Samango*, the Ninth Circuit said:

> The Court's power to dismiss an indictment on the ground of prosecutorial misconduct is frequently discussed but rarely invoked. Courts are rightly reluctant to encroach on the constitutionality-based independence of the prosecutor and grand jury. [26]

[26] In almost seven years on this bench this case and *United States v. Anderson, supra*, are the only two instances out of many cases in which I have felt constrained to dismiss an indictment.

> The Court 'will not interfere with the Attorney General's prosecutorial discretion unless it is abused to such an extent as to be arbitrary and capricious and violative of due process.' *United States v. Welch*, 572 F.2d 1359, 1360 (9th Cir.), *cert. denied*, 439 U.S. 842, 99 S.Ct. 133, 58 L.Ed.2d 140 (1978).

Nevertheless:

> On occasion, and in widely-varying factual contexts, federal courts have dismissed indictments because of the way in which the prosecution sought and secured the charges from the grand jury. . . . These dismissals have been based either on constitutional grounds or on the court's inherent supervisory powers. . . . Whatever the basis of the dismissal, however, the court's goal has been the same, 'to protect the integrity of the judicial process,' . . . particularly the functions of the grand jury, from unfair or improper prosecutorial conduct. (citations and footnotes omitted.)

607 F.2d at 881 quoting *United States v. Chanen*, 549 F.2d 1306, 1309 (9th Cir.) *cert. denied*, 434 U.S. 825, 98 S.Ct. 72, 54 L.Ed.2d 83 (1977).

From the inception of the twenty-month grand jury investigation when the prosecutors divined the office of "agent of the grand jury" on the IRS agents through the time of the agent's improper "summaries" presented shortly before the indictment was returned, the conduct of the Department of Justice attorneys substantially undermined the ability of the grand jury to exercise independence. The numerous abuses and violations of rules and constitutional principles must be considered particularly serious because of the admissions in these hearings that, for the most part, the activity was undertaken knowingly and purposefully.

In addition to the abuses detailed in this memorandum opinion numerous other instances of misconduct are re-

counted by Judge Winner in his August 25, 1983 Opinion. In sum, the substantial departures of prosecutors in this case from established notions of fairness, from clearly articulated rules of law, from specific rules of procedure and, indeed from the Department of Justice's own manual and operating directives constitute systematic and pervasive overreaching. There is no doubt that the indicting grand jury was usurped and that time-honored constitutional principles were sullied.

Some of the violations, standing alone, require dismissal. Others, while not singularly requiring dismissal, when combined with one another amount to travesty. What is perhaps most alarming is that even in the very last of so many hearings, one of the prosecuting attorneys continued to refer to the challenge to his and his colleagues' conduct as "silly" and "frivolous." K. Tr. 1137. The supervisory authority of the court must be used in circumstances such as those presented in this case to declare with unmistakable intention that such conduct is neither "silly" nor "frivolous" and that it will not be tolerated.

The government attorneys, who replaced the prosecutors whose activities are at issue, reluctantly acknowledge that with regard to *at least* two of the procedures employed in this investigation they were "technically inaccurate" and "should obviously not be repeated in the future." *See* Government Response to Defendants' Opening Brief in Support of Motions to Dismiss the Indictment, filed November 14, 1983, at pp. 11, 15. When all "the technically inaccurate" procedures and abuses which "should obviously not occur in the future" are accumulated, what emerges is a picture of an IRS investigation out of control and a grand jury which was converted into little more than a rubber stamp.

The Fifth Amendment guarantees that no person shall be held to answer for an infamous crime "unless on a

presentment or indictment of a grand jury." The Supreme Court observed in *United States v. Dionisio*, 410 U.S. 1, 16-17, 93 S.Ct. 764, 772-773, 35 L.Ed.2d 67 (1973) that "[t]his constitutional guarantee presupposes an investigative body 'acting independently of either prosecuting attorney or judge,' *Stirone v. United States*, 361 U.S. 212, 218, 80 S.Ct. 270, 273, 4 L.Ed.2d 252, whose mission is to clear the innocent, no less than to bring to trial those who may be guilty." As a result of the conduct of the prosecutors and their entourage of agents, the indicting grand jury was not able to undertake its essential mission. That such is a significant and prejudicial deprivation of these defendants' constitutional rights to due process of law and personal liberty should require no further recitation of authority.

ORDER

Based on the foregoing I hold and ORDER as follows:

1. The indictment is dismissed because of the numerous violations of Rule 6(d), Fed.R.Crim.P.

2. The indictment is dismissed because of the numerous violations of Rule 6(e), Fed.R.Crim.P.

3. The indictment is not dismissed solely for the use of "pocket immunity" in contravention of 18 U.S.C. §§ 6002 and 6003.

4. The indictment is not dismissed solely for violations of the Fifth Amendment to the United States Constitution.

5. The indictment is not dismissed solely for the knowing and deliberate presentation of misinformation to the grand jury.

6. The indictment is not dismissed solely for violations of the Sixth Amendment to the United States Constitution.

7. The indictment is dismissed because of the totality of the circumstances which include numerous violations of Rule 6(d) and (e), Fed.R.Crim.P., violations of 18 U.S.C. §§ 6002 and 6003, violations of the Fifth and Sixth Amendments to the United States Constitution, knowing presentation of misinformation to the grand jury and mistreatment of witnesses.

APPENDIX D

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 84-1231, 83-2284

THOMAS D. BLONDIN, JARED J. SCHARF, and STEVEN L. SNYDER,
Petitioners,

v.

HONORABLE FRED M. WINNER, UNITED STATES DISTRICT JUDGE for the DISTRICT OF COLORADO,
Respondent.

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

WILLIAM A. KILPATRICK,
Defendant-Appellee.

July 20, 1987

Francis J. Blanchfield, Jr. of Johnson & Blanchfield, P.A., Charlotte, N.C., for petitioners.

Denis H. Mark of Waller, Mark & Allen, P.C. (William C. Waller, on the brief), Englewood, Colo., for defendant-appellee.

Glenn L. Archer, Jr., Asst. Atty. Gen., and Michael L. Paup, Robert E. Lindsay, and Alan Hechtkopf, Attorneys, Tax Div., Dept. of Justice, Washington, D.C., submitted a brief for plaintiff-appellant.

Lawrence W. Treece of Bender & Treece, P.C., Denver, Colo., submitted a brief for amicus curiae American Civil Liberties Union Foundation of Colorado.

Leonard B. Boudin of Rabinowitz, Boudin, Standard, Krinsky & Lieberman, P.C., New York City, submitted a brief for amicus curiae Nat. Emergency Civil Liberties Committee.

Before HOLLOWAY, Chief Judge, SEYMOUR, Circuit Judge, and BOHANON,* District Judge.

SEYMOUR, Circuit Judge.

These cases arise from a federal district judge's publication of a memorandum opinion and his subsequent refusal to withdraw it or to delete from it information identifying three Justice Department attorneys. In case number 83-2284, *United States v. Kilpatrick*, the Government appeals the order denying its motion to withdraw or modify the opinion, and in the alternative seeks a writ of mandamus. Case number 84-1231, *Blondin v. Winner*, is an original action by the three individual attorneys requesting mandamus relief. We conclude that the district court order is not appealable and that petitioners have not shown that they are entitled to an extraordinary writ.

I.

BACKGROUND

A chronology and description of these convoluted proceedings is essential to our discussion of the arguments presented to this court. On September 30, 1982, after

* Honorable Luther L. Bohanon, Senior District Judge, Western District of Oklahoma, sitting by designation.

an extensive investigation of tax shelters set up by William Kilpatrick, a federal grand jury returned a twenty-seven count indictment against Kilpatrick, six other individuals, and the Bank of Nova Scotia. Twenty-six of the counts charged Kilpatrick and others with conspiracy, mail fraud, and/or tax fraud. Count twenty-seven charged Kilpatrick with obstruction of justice. Steven Snyder and Thomas Blondin, attorneys with the Tax Division of the Justice Department, had presented the evidence to the grand jury. Jared Scharf, another Tax Division attorney, had been involved in the investigation before and after the indictment was filed.

On February 21, 1983, Judge Kane dismissed the first twenty-six counts for failure to state a crime, and the Government appealed. In May 1983, with Judge Winner presiding, Kilpatrick was convicted by a jury on count twenty-seven. Snyder, Blondin, and Scharf prosecuted the case.

Kilpatrick filed post-trial motions for a new trial and for dismissal of the indictment on the basis of prosecutorial misconduct by Snyder, Blondin, and Scharf in the grand jury proceedings and after indictment. Hearings on these motions were held before Judge Winner July 12 through July 15. The Government was on notice long before the July hearing that the testimony of Snyder, Blondin, and Scharf was necessary to resolve the allegations of prosecutorial misconduct. The record also indicates that Judge Winner repeatedly expressed his concern to these three attorneys that they could not ethically continue to represent the Government in a proceeding in which they were required to testify. Nonetheless, when the hearing began, Scharf appeared for the Government.[1] Upon questioning by the court, Scharf refused to withdraw, telling the court that the Justice Department at-

[1] Thomas Blondin was also present but the Government had apparently conceded that he could not appear on its behalf.

torney from Washington who would subsequently represent the Government was not yet familiar enough with the case to be competent. Although Scharf actively participated in the taking of testimony the morning of July 12, following the lunch break he announced that he could no longer represent the Government. The court pointed out that Scharf had known about the problem for quite some time, and that witnesses had been called and time had been set aside. Consequently, the court decided to continue taking evidence. However, the court also stated that the Government would be allowed transcripts of the testimony and would be permitted to recall witnesses for cross-examination.

During the proceedings that afternoon, a local assistant United States attorney, who was apparently present at the proceedings in an unofficial representative capacity, appeared for the Government to point out to the court that a witness who had testified was still in the courtroom and to request that he be sequestered. Defense counsel then asked whether a motion to sequester had been made. The court responded that if the Rule had been invoked, it would apply to all witnesses, including the three Tax Division attorneys. The Government did not object to this ruling and the Tax Division attorneys were excluded, although Blondin was allowed to remain as the advisory witness for the Government. The court subsequently pointed out that the sequestered attorneys were precluded from reading the transcripts of testimony taken while they were not permitted to be present.

The following day, July 13, the Government was represented by the replacement attorney from the Justice Department and the hearing continued.[2] On July 14, the district judge stated that he wanted Snyder put on and

[2] Contrary to petitioners' assertion in their brief, the record reveals that no testimony was taken that day until the replacement counsel arrived.

that he would run nights and Saturday if necessary. Rec., vol. 7, at 394. The judge later repeated his desire to hear testimony from Snyder and Scharf promptly to learn their version of what had happened. *Id.* at 630. The Government attorney responded that he was not ready to put them on and implied that he would be ready in mid-August when the hearings were scheduled to resume. *Id.* at 630-32. On July 15, the court commented on the nature of the evidence and again encouraged the Government to put on these witnesses. Rec., vol. 8 at 787. The hearing was then recessed until August 16, 1983.

On August 8, at defendants' request, this court partially remanded the appeal of the dismissal of the first twenty-six counts of the indictment to permit the district court to consider whether all the counts should be dismissed on the basis of prosecutorial misconduct. When the hearing recommenced on August 16, the judge stated that, in view of the partial remand and his imminent retirement from the bench, he would not be able to rule on the motion to dismiss. He also stated that he intended to write a memorandum opinion on the proceedings thus far to aid the district judge who would ultimately decide the issue. Rec., vol. 9, at 869. The judge reiterated that he planned "to write a memorandum summarizing, without ruling on anything having to do with the motion to dismiss, but summarizing the positions of the parties, the accusations that are made, and the denials that are made to those accusations." *Id.* at 874. When the Government indicated that it would not put on Snyder or Blondin,[3] the court again recommended that they testify, observing that their testimony was vital and that their absence "casts the entire thing in a poor light." *Id.* at 994.

[3] Jared Scharf had been called as a witness by Kilpatrick and cross-examined by the Government on July 15.

On August 17, the judge again expressed his desire to hear Snyder's testimony, pointing out that although he wanted to write a reasonably complete memo, the memo could only be based on the testimony presented. Rec., vol. 10, at 1209. The Government attorney stated that he understood and would not expect anything else, but nonetheless did not call Snyder as a witness. The court then pointed out that because Snyder and Blondin were both in Denver, taking their testimony at that time would be efficient. *See id.* at 1210. Finally, in response to a question by the Government attorney, the judge clearly indicated that the memorandum he was going to write would likely be for publication. *See id.* at 1269.

The district judge did write a published memorandum opinion in which he granted Kilpatrick's motion for a new trial, described the evidence presented on the issue of prosecutorial misconduct, and ordered that the transcripts of the grand jury proceedings be made available to defense counsel. *See United States v. Kilpatrick*, 575 F.Supp. 325 (D.Colo.1983). That opinion has generated the cases presently before this court. Following publication of the opinion and the district court's refusal to withdraw or amend it, the Government filed its appeal/petition and sought emergency relief in this court pending our decision on the merits. After delaying action on the Government's emergency motion long enough to give the other parties time to respond, we denied emergency relief on January 24, 1984.

A ten-day hearing on defendants' motion to dismiss the entire indictment for prosecutorial misconduct was subsequently held before Judge Kane. In a published opinion, Judge Kane dismissed the indictment, referring to much of the same evidence that had been set out in Judge Winner's memorandum. *See United States v. Kilpatrick*, 594 F.Supp. 1324 (D.Colo.1984). The Government appealed. This court reversed, concluding that although misconduct had occurred, it had not affected the

independent judgment of the grand jury, and that such an effect was a prerequisite to dismissal. *See United States v. Kilpatrick*, 821 F.2d 1456 (10th Cir.1987).

II.

APPEALABILITY

This court has jurisdiction to hear appeals from final decisions of the district court. *See* 28 U.S.C. § 1291 (1982). "To be final and appealable, the district court's judgment must end the litigation and leave nothing to be done except execute the judgment." *First Bank v. Albuquerque Nat'l Bank (In re Glover)*, 697 F.2d 907, 909 (10th Cir.1983). Although recognizing that the order at issue here does not end the litigation, the Government nonetheless contends that the decision is appealable because it is a collateral order within the meaning of *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949). "To come within the 'small class' of decisions excepted from the final-judgment rule by *Cohen*, the order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468, 98 S.Ct. 2454, 2457, 57 L.Ed.2d 351 (1978). The Supreme Court has cautioned that the collateral order doctrine "is limited to trial court orders affecting rights that will be irretrievably lost in the absence of an immediate appeal." *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 430-31, 105 S.Ct. 2757, 2761, 86 L.Ed.2d 340 (1985).

Assuming that the district court's order finally determined the publication and content of its opinion, and even assuming solely for argument that the *propriety* of the court's recitation of and comments on the evidence is an issue completely separate from the merits, we can-

not say that "denial of immediate review would render impossible any review whatsoever." *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 376, 101 S.Ct. 669, 674, 66 L.Ed.2d 571 (1981) (quoting *United States v. Ryan*, 402 U.S. 530, 533, 91 S.Ct. 1580, 1582, 29 L.Ed.2d 85 (1971)). It is the content of the opinion that is at the heart of this appeal. However, the opinion clearly stated that the record to date was incomplete, that the court was making no findings on the asserted prosecutorial misconduct, and that additional hearings in district court on the issue would be forthcoming. Such a preliminary recitation of allegations and evidence is by its nature subject to review and correction through later proceedings. We therefore conclude that the order is not appealable under *Cohen* and its progeny.[4]

III.

MANDAMUS

In the alternative, the Government and the individual petitioners assert that they are entitled to a writ of mandamus. "[T]he remedy of mandamus is a drastic one, to be invoked only in extraordinary circumstances." *Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 34, 101 S.Ct. 188, 189, 66 L.Ed.2d 193 (1980). To ensure that the writ is issued only in exceptional cases, the Supreme Court requires that a party seeking this relief "have no other adequate means to attain the relief he desires" and show that his "right to issuance of the writ is 'clear and indisputable'". *Id.* at 35, 101 S.Ct. at 190 (quoting *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379,

[4] We note that, in a related context, the Supreme Court has held that an attorney's interest in immediate vindication of an alleged erroneous finding of misconduct is insufficient to establish the appealability of an interlocutory order. *See Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 432-35, 105 S.Ct. 2757, 2762-63, 86 L.Ed.2d 340 (1985) (order disqualifying counsel in civil case not immediately appealable).

384, 74 S.Ct. 145, 148, 98 L.Ed. 106 (1953)); *see also Barclaysamerican Corp. v. Kane*, 746 F.2d 653, 654 (10th Cir.1984).

Petitioners here have failed to offer any ground upon which their right to relief is clear and indisputable. They contend that they were denied due process because they were not forwarned that they should put on evidence. This assertion is flatly contradicted by the record, which establishes that the district judge repeatedly sought testimony from the attorneys who are petitioners here, told Government counsel numerous times that he would write a memorandum setting out the evidence presented, and stated that his opinion would likely be published. Petitioners also assert due process denials arising from the Government's alleged inability to cross-examine some witnesses effectively and from the sequestration order. As set forth in Part I, these circumstances were the product of the Government's own actions in the hearings, and the Government made no objection below on these grounds. Indeed, the Government was actually at an advantage by having transcripts of the witnesses' direct testimony to use between the July and August hearings in preparing its cross-examination.

Petitioners also assert that they are entitled to mandamus relief because the district court's discussion of the evidence of prosecutorial misconduct was not relevant to the issues it decided. In its opinion, however, the court ordered disclosure of the grand jury transcripts to defense counsel. The Federal Rules of Criminal Procedure allow the court to permit disclosure "upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury." Fed.R.Crim.P. 6(e)(3)(C)(ii). The decision to release the transcripts and the determination whether a sufficient showing has been made are matters committed to the trial court's discretion. *See Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 223, 99 S.Ct. 1667, 1675,

60 L.Ed.2d 156 (1979; *United States v. Warren*, 747 F.2d 1339, 1347 (10th Cir. 1984). In refusing to amend his memorandum, the judge indicated that he felt the recitation of evidence was necessary to support his decision to order disclosure. When the challenged action is one involving the exercise of discretion, mandamus relief is particularly inappropriate. *See Daiflon*, 449 U.S. at 36, 101 S.Ct. at 190.

Finally, petitioners argue vigorously that they are entitled to the writ because the district court opinion was defamatory.[5] However, the district court specifically stated that it was only setting forth the evidence presented to date, that it was making no findings, and that further proceedings would follow.

> "Because [an] additional hearing is required, I shorten discussion of most of the claims of prosecutorial misconduct, but I shall comment briefly on them. Frequently I will phrase the charges as if the facts had been established, but I emphasize that I am not saying that the facts have been proven. I am just adopting the practice of the government in phrasing an indictment in language saying that thus and so are the facts. I am only phrasing the defendant's charges against the government in the same way the government phrases its charges against a defendant, and the fact that the charges are made is not evidence that they are true, nor do I find that they are."

Kilpatrick, 575 F.Supp. at 332. Thus the memorandum by its own language warns the reader that the opinion

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[5] Petitioners also assert that the district judge was biased and should have recused himself. No motion to recuse was filed below. In any event, petitioners have since obtained the appropriate relief through their subsequent full hearing on prosecutorial misconduct before another judge.

must be read in light of the extent, if any, to which it may be inconsistent with subsequent opinions.

Moreover, asking this court to issue a writ of mandamus directing a district judge to withdraw or to expunge portions of a published opinion raises issues under the First Amendment even more serious than those that prompted this court to deny the Government request for temporary emergency relief. Petitioners have failed to offer any arguments or authorities that adequately dispel the grave constitutional concerns their petition raises. Their right to relief on this ground is hardly clear and indisputable.

At oral argument, counsel for petitioners conceded that petitioners could not ask this court to order the district court to withdraw publication, and instead requested us to issue an opinion commenting on the propriety of the district court's memorandum. Such relief would be essentially indistinguishable from the relief provided by an opinion on the merits after appeal. Petitioners' interest in their reputations was subject to vindication by the contemplated further proceedings, which would necessarily ascertain the validity of the charges and the evidence set out in the memorandum at issue. Simply put, petitioners are not entitled to this mandamus relief for the same reason we have no appellate jurisdiction—the alleged harm from the district court's order was remediable below or on appeal because it was inextricably intertwined with the merits of the alleged prosecutorial misconduct. Mandamus is not appropriate unless the petitioner has "no other adequate means to attain the relief he desires." *Daiflon*, 449 U.S. at 35, 101 S.Ct. at 190.

In sum, petitioners have failed to make a sufficient showing of their right to relief, and we therefore deny the petition for a writ of mandamus. In so doing, we recognize that the feelings of all participants in these proceedings have run high. Those participants would

have been wise had they heeded the counsel offered by Judge Breitenstein in *Lane v. Wallace*, 579 F.2d 1200, 1203 (10th Cir. 1978):

> "[J]udges should be ever mindful of the words of Francis Bacon in his essay on 'Judicature.' . . .
>
> > 'Judges ought to be more learned than witty; more reverend than plausible; and more advised than confident. • • •
> >
> > Patience and gravity of hearing is an essential part of justice; and an overspeaking judge is no well tuned cymbal.'
>
> Expressed in modern parlance, a judge should not talk too much. Bacon also said . . .
>
> > 'And let not counsel at the bar chop with the judge, nor wind himself into the handling of the cause anew after the judge hath declared his sentence • • • • .'
>
> The meaning is that an advocate should not protest too much."

The appeal is dismissed and the petition for a writ of mandamus is denied.

APPENDIX E

UNITED STATES DISTRICT COURT
D. COLORADO

No. 82-CR-222

UNITED STATES OF AMERICA,
Plaintiff,

v.

WILLIAM A. KILPATRICK, *et al.*,
Defendants.•

Aug. 25, 1983

William Waller and Richard K. Rufner, Wagner and Waller, Englewood, Colo., for defendant Kilpatrick.

James L. Treece, Treece, Zbar, Webb & Kenne, Littleton, Colo., for defendant Declan O'Donnell.

James Nesland, Ireland, Stapleton & Pryor, Denver, Colo., for defendant Bank of Nova Scotia.

H. Alan Dill, Dill & Dill, P.C., Denver, Colo., for defendant Sheila Lerner.

Linda Surbaugh and Robert Miller for U.S. Atty's. Office, D. Colo., Denver, Colo., and Charles J. Alexander, Dept. of Justice, Tax Div., Washington, D.C., for U.S.

• This opinion which was originally published at 570 F.Supp. 505 was withdrawn from the bound volume on order of the United States Court of Appeals for the Tenth Circuit that further publication be temporarily delayed. The order so providing has now been vacated by the Court of Appeals.

WINNER, District Judge.

This case was started with a multiple count, multiple defendant indictment returned after an investigation spanning the lives of two grand juries. Judge Kane dismissed all except one count, which left a one defendant charge of obstruction of justice case to try. It was prosecuted by three attorneys employed by the Tax Division of the Department of Justice in Washington. The single remaining count of the indictment had absolutely nothing to do with tax law, and the trial could have been handled competently and with aplomb by any assistant United States Attorney living in Denver, but the administrative decision of the Department of Justice was to send three lawyers from the Tax Division to try an obstruction of justice case, a prosecution unrelated to their professed area of expertise.

I mention this fact for one very important reason. Following a jury verdict of guilty, defendant moved for dismissal or a new trial, and the pending dismissal motions rest on accusations of IRS and prosecutorial misconduct during the grand jury proceedings and during trial. There is absolutely no suggestion of any improper conduct on the part of the United States Attorney for the District of Colorado or on the part of any of his assistants. Defense counsel carefully point out that neither they nor their client complain about anything other than acts of the IRS and Department of Justice Tax Division lawyers who ran the grand jury and tried the case. Based upon my review of the record and participation in the trial, I share their view that the Colorado United States Attorney's Office is absolutely blameless in this case so fraught with problems. Also, it should be emphasized that no one is critical of government counsel now handling the post trial motions.

To fully cover all of the headaches of this case would require a volume, and I don't plan to write that book for

reasons which will appear presently. Instead, I shall highlight some of the things which occurred during the investigation and during the trial of the case. But, there are so many things to cover that this opinion won't be short. Many of the accusations are disputed by the accused government counsel and agents, but they are forced to admit a few instances of "mistake", and their denials of facts run contrary to testimony of a large number of witnesses. To accept the testimony of government witnesses at full value would require that I effectively decide that quite a few reputable lawyers and citizens of this community and other communities are guilty of perjury, and I make no such determination. The record made to date is incomplete. A full evidentiary hearing was scheduled, but, as will be explained later, present government counsel was not able to prepare for the first hearing, and the testimony of essential government witnesses was put over for three weeks. It was ordered that a summary of the testimony of government witnesses be furnished in advance of a hearing scheduled some three weeks later. The summary was furnished, but the government witnesses weren't called although I and defense counsel wanted them called. Therefore, at this point, all I have to rely on is the summary of proposed testimony, but the witnesses have not been sworn nor have they been cross examined.

With that, then, I set the stage for some of the bizarre happenings in this case, and I do so by mentioning a frequently quoted case. In 1935, in *Berger v. United States*, 295 U.S. 78, 55 S.Ct. 629, 79 L.Ed. 1314, Justice Sutherland, speaking for a unanimous court, criticized the misconduct of the prosecutor in that case. The prosecutor had injected his personal belief concerning the facts of the case (so did a prosecutor here) and he had unfairly cross-examined witnesses. That which the court said concerning reliance by a jury on a prosecutor's integrity is even more applicable to the reliance of a

grand jury on a prosecutor. As to a prosecutor's duties, the Court said:

> "The United States Attorney is the representative not of an ordinary person to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.
>
> "*It is fair to say that the average jury, in a greater or less degree, has confidnce that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed . . .*"

Perhaps the thing which disappoints me the most is the forgetfulness of the grand jury itself in going along with having two IRS agents in charge of the IRS investigation sworn as "agents of the grand jury". Yet, I can understand, as Justice Sutherland said in *Berger v. United States*, that grand jurors rely on Justice Department lawyers for their legal advice. They should do this, but because I empanelled the first of these two grand juries, I know what those jurors were told, and I strongly suspect that the second grand jury was told about the same thing. I orally, and on the record, stressed that a grand jury has a duty to protect the innocent and I emphasized that a grand jury is an independent body, separate and apart from investigative

agencies and that grand juries are not an arm of the prosecution but instead, they have a duty to examine the government's case carefully. I didn't tell them that they couldn't appoint IRS agents as their own "agents", because it never occurred to me that there could be such a blurring of the "investigative agency", "prosecuting attorney" and "grand juror" functions. However, I did supply each grand juror with a copy of the recommended instructions to grand jurors authored under the auspices of the Judicial Center, and I urged each grand juror to read the instructions frequently to be sure that they adequately performed their duties. (I now urge that Justice Department prosecutors read them). Those instructions say in important part:

> "You will recall from my earlier remarks that the grand jury developed in England as an entity independent from the king to protect a subject from an unwarranted prosecution. The king could not charge a subject with a serious crime without first submitting evidence and witnesses to a grand jury, which then decided whether to return an indictment against the accused person.
>
> Just as the English grand jury was independent of the king, the federal grand jury under the United States Constitution is independent of the United States Attorney, the prosecutorial agent of the executive branch of the federal government. The grand jury is not an arm of the Federal Bureau of Investigation; it is not an arm of the Internal Revenue Service; just as it is not an arm of the United States Attorney's Office. There has been some criticism of the institution of the grand jury for allegedly acting as a mere rubber stamp approving prosecutions that are brought before it by government representatives. Similarly, you would perform a disservice if you did not indict where the evidence warranted an indictment.

As a practical matter, you must work closely with the government attorneys. The United States Attorney and his assistants will provide you with important service in helping you to find your way when confronted with complex legal matters. It is entirely proper that you should receive this assistance.

However, you must remember that you are not the prosecutor's agent. Your role is related to but clearly distinct from that of the government attorneys who will assist you, and it is important that you keep the distinction between the roles clearly in mind. Although you must work closely with the government, you must not yield your powers nor forego your independence of spirit.

These comments are meant to be cautionary in nature. The government attorneys are sincere men and women, and you will develop ordinary human feelings as you work with them during your term of service. If past experience is any indication of what to expect in the future, then you can expect candor, honesty, and good faith efforts in every matter presented by the government. However, it is because you may tend to expect such high quality from the government's agents that there is a potentially grave risk to your independence of thought and action, which may cause you to lapse into reliance when you should be dubious or questioning.

You should also remember that the government attorneys are advocates of the government's interests. They are prosecutors; you are not. While they will usually balance fairly the government's interest against the interest of a citizen's personal liberty, it is your responsibility to ensure that the proper balance is achieevd in every case brought to your attention. You must exercise your own judgment,

and if the facts suggest a different balance than that advocated by the government attorneys, then you must achieve the appropriate balance even in the face of their opposition or criticism."

In the face of these instructions, the grand jury wasn't two minutes into its investigation when one of the Justice Department lawyers personally administered an "oath" to an IRS Special Agent, and that "oath" was:

> "Mr. Mendrop, do you swear to carry out the duties as directed by the Foreman and Members of the Grand Jury, keep all proceedings of matters and documents which are received pursuant to your work with this grand jury secretive?" (sic).

In its brief the government says:

> "The government concedes that Mr. Synder had no authority to administer oaths to agents. However, Mr. Snyder will testify, and the record will reflect, that the agents were first given an oath by the foreman. It was only after they had been sworn in by the foreman that Mr. Snyder gave the agents what purported to be an additional oath directing the agents to maintain secrecy."
>
> [As has been noted, this testimony hasn't been presented yet, and on the sworn record made to date, it is not clear who gave an oath to testify truthfully.]

The government then "quotes" from the transcript which shows that those were the facts. That's not what the transcript which was supplied to me shows, and I am concerned about the validity of someone's transcript. It is true that other "oaths" administered by Mr. Snyder do appear to have followed an oath administered by someone to testify truthfully, but if any such oath was administered to Mr. Mendrop at the first session, it doesn't show up in my copy of the transcript.

Six months later, the Special Agents of the IRS were each sworn as an "agent" of the second grand jury, and if there could be any doubt as to the mingling of the investigative agency/prosecutorial/grand jury functions, the hash which results from the following proceedings eliminates that doubt. After a statement by government counsel that he wanted the agent sworn as an "agent of the grand jury", this job description was furnished by Mr. Snyder:

> ". . . when he interviews people and he looks at this stuff, he is not looking at it so much as a special agent of the criminal investigation division of the Internal Revenue Service, and he is looking at (it) as your agent and he is amendable to you and he is amendable to Rule 6. Do you recall Rule 6, the Grand Jury secrecy?
>
> "*Whta it is, is very, very plain, and it states in what capacity he is operating in this investigation so there is no question about it.*
>
> (The agent was then sworn as a witness by someone, and the transcript continues)
>
> "MR. SNYDER: Do you have the oath to make him a—they don't have the oath. Raise your right hand. Do you solemnly swear that the information and evidence which you receive pursuant to the Grand Jury you will keep secret to yourself *except as provided by the foreman of the Grand Jury* or federal judge? . . . In the course of your *duties as a special agent and also as an agent of a previous grand jury* have you conducted an investigation into the affairs of one William A. Kilpatrick?"

I don't know how it could be any clearer than in Mr. Snyder's eyes, the agent's investigation was a combined IRS and Grand Jury investigation conducted by a single "agent", and, of course, under Rule 6 he was the prose-

cuting attorney's little helper. That isn't what the stock instructions to grand jurors say should be done, and, although the government argues that other grand juries have had agents, it fails to come up with a case approving the practice and it fails to mention any case discussing the blurring of functions. The government relies on *United States v. Cosby*, (1979) 5 Cir., 601 F.2d 754. There, the court itself challenged the practice of appointing an "agent of the grand jury", but it "assumed" that the practice was proper because it reversed the case on other grounds. The opinion cites several cases where "the use of third parties to assist grand juries has been considered and approved," but it is to be noted that those cases were decided before the amendment of Rule 6(e) which makes no mention of grand jury "agents" and which says that disclosure may be made to government lawyers for use in the performance of duty, and to other governmental personnel "as are deemed necessary by an attorney for the government *to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law.*" The rule doesn't permit the grand jury to have an "agent", and it categorically says that Rule 6(e) permits disclosure to nonlawyers for the single purpose of assisting the "attorney for the government". The rule doesn't mix up the separate functions of prosecutor and grand jury, and with Rule 6(e) clarified, those functions cannot be blended.

My thoughts on this score are in full accord with those of the Advisory Committee, because its note to the 1972 amendment to Rule 6(e) says:

> "Federal crimes are 'investigated' by the FBI, the IRS, or by Treasury agents, *and not by government prosecutors or the citizens who sit on grand juries.*"

Here, the "Grand Jury Agents" investigated and they testified, all the while being special agents of the IRS, and, as will be detailed later, a government prosecutor "investigated" on the streets of Puerto Rico.

The government concedes the obvious. A lawyer employed by the Tax Division of the Department of Justice can't administer oaths, but, sworn or unsworn, I don't think that an IRS special agent can act in the combined capacity of IRS Agent, "Agent for the Grand Jury" and recipient of grand jury information supplied under Rule 6(e) for the sole purpose of helping out the prosecutor. This is a confusion not of apples and oranges. It is confusing apples, oranges and bananas.

Admitting impropriety in the conduct of counsel, the government's brief argues that the error wasn't serious and that it resulted from good motives of Mr. Snyder. The error may or may not be serious, and I express no opinion as to the gravity of the error. However, the government is playing with fire in arguing that good motive excuses making one's own law. I discussed my thinking of this argument at quite some length in *United States v. Best*, (1979) 476 F.Supp. 34, where I ruled that a belief that blocking some railroad tracks would save the world from nuclear devastation didn't excuse the offense, and the Tax Division has surely heard tax protestors say that their motives in refusing to obey the tax laws are pure as the driven snow. Mr. Snyder's good intentions don't excuse his arrogation of a power he didn't have. And, even if the illegal "oath" doesn't amount to serious error, it started the case downhill on a course of repeated excesses on the part of the prosecution. Good intentions or ignorance of the law don't make those errors go away. The creation of the "office" of grand jury agent is harder to excuse when the impartial jurors' "agent" is a chief investigator of the IRS case against the defendants and is receiving grand jury information under Rule 6(e) only to help out the attorney for the government charged with the supervision of presentation of the government's case to the grand jury.

What has been said thus far, and much of that which is to follow, bear in no way on the trial itself, and,

therefore, those things can't enter into a decision of whether a new trial should be granted. That which took place during the grand jury proceedings and most of that which took place outside the presence of the jury couldn't poison the jury verdict, and these alleged transgressions are argued in support of the motion to dismiss because of prosecutorial misconduct and in support of claimed lack of professionalism of government counsel. Therefore, insofar as possible, I shall try to discuss the arguments bearing on the new trial motion in a separate part of this memorandum.

In a brief filed by trial counsel (not signed by present counsel for the government and not adopted by Colorado's United States Attorney whose typewritten signature does appear) the many acusations were described as "silly", but they aren't either silly or frivolous. Indeed, the brief filed by trial counsel was couched in language far different from that which the court is accustomed to reading. When asked, Mr. Scharf said that higher authority in the Justice Department Tax Division had approved the brief and its phraseology, and that higher authority thought the whole thing was a ploy of defense counsel. If that be so, the lawyers in the upper echelon of the Tax Division have adopted a style of brief writing markedly different from that Justice Department lawyers have filed with this court in the past, and I have had my fair share of experience in dealing with Tax Division lawyers for whose ability and ethics I have the highest regard. And, if the overlords of the Tax Division think this whole mess is just a ploy, I recommend that they take a second look.

Since I started this with the grand jury proceedings, I think that I should continue with them and with matters which occurred during the trial which don't impact on the new trial motion but which are aimed at the dismissal motion and lack of professionalism. I think that the place to start is with Rule 6(e), F.R.Cr.P. itself,

because that is the rule which governs grand juries and it is the rule which was violated here. I quote from Rule 6(e) and I italicize the phrases in that section which are of importance to this case:

"(e) Recording and Disclosure of Proceedings.

"(1) All proceedings, except when the grand jury is deliberating, shall be recorded stenographically or by an electronic recording device. An unintentional failure of any recording to reproduce all or any portion of a proceeding shall not affect the validity of the prosecution. *The recording or reporter's notes or any transcript prepared therefrom shall remain in the custody or control of the attorney for the government* unless otherwise ordered by the court in a particular case.

"(2) A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, *an attorney for the government, or any person to whom disclosure is made under paragraph (3)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury* except as otherwise provided by these rules. *No obligation of secrecy may be imposed on any person except in accordance with this rule.* A known violation of Rule 6 may be punished as a contempt.

"(3)(A) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than its deliberations and the vote of any grand juror, may be made to—

"(i) an attorney for the government for use in the performance of such attorney's duty; and

"(ii) such government personnel as are deemed necessary *to assist an attorney for the government in the performance of such attorney's duty to enforce criminal law.*

(I don't know how it can be argued that this language permits disclosure to IRS agents to work as "agents for the grand jury" unless it is argued that the grand jury is simply an arm of the prosecutor's office, and if that be the argument, almost 800 years of history is going to have to be forgotten. The document King John signed at Runnymede contains no such concept, nor does our Constitution.)

"(ii) such government personnel *as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty* to enforce federal criminal law.

(It seems pretty clear to me that the IRS agents to whom disclosure was made were hired guns of the prosecutor and the IRS—not of the grand jury.)

"(B) . . . An attorney for the government shall promptly provide the district court, before which was empanelled the grand jury whose material has been so disclosed, with the names of the persons to whom such disclosure has been made. (The language of the rule is this clumsy.)

"(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made.

. . . . .

"(ii) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury.

If the court orders disclosure of matters occurring before the grand jury, the disclosure shall

be made in such manner, at such time, and under such conditions as the court may direct."

I first mention something not raised by defense counsel, but defense counsel had no way of knowing anything about it. I found out about it from a scanning of the full file drawer of grand jury transcript. A while back, it was the practice to make grand jury witnesses take an oath of secrecy, and this is still the rule in some state court systems. Because of public outcry, the rule was changed, and, as has been seen, this is now verboten because of the language of the rule saying, "No obligation of secrecy may be imposed on any person except in accordance with this rule." This language has been uniformly interpreted to prohibit any instruction to a witness that his testimony is secret. *In re Langswager*, (1975) D.C.Ill. 392 F.Supp. 783; *In re Grand Jury Witness Subpoenas* (1974) D.C.Fla. 370 F.Supp. 1282; *In re Alvarez* (1972) D.C.Cal. 351 F.Supp. 1089; *In re Minkoff* (1972) D.C.R.I. 349 F.Supp. 154; *In re Investigation before April 1975 Grand Jury* (1976) D.C.Cir. 531 F.2d 600; *In re Vescovo Special Grand Jury* (1979) 473 F.Supp. 1335, and many other cases. In spite of this express command of Rule 6(e), secrecy obligations were imposed on several witnesses, and, to make the violation more disturbing, secrecy obligations were imposed on lawyers called to furnish information concerning their clients. That makes the violation gravely beyond the pale, because of the impossible position the lawyer-witness is placed in, but that's what the grand jury transcript discloses. No "oath" of secrecy was administered, but an obligation of secrecy was imposed by instructions from government counsel to witnesses. This foolishness may or may not have been intentional, but ignorance of the law is not a defense available to a prosecutor. This misconduct is established by the record, and it will prove difficult for the government to deny, just as the government had to admit the attempted administration of an

"oath" by Mr. Snyder. The government surprisingly defends the proven mishmash of function of the IRS Special Agent/Grand Jury Agents/Assistants to the Attorney for the Government appointed under Rule 6(e), but maybe it thinks that admitting that this was error would confess the motion to dismiss.

I come now to other accusations made by defendant and pretty much denied by the prosecutors and IRS agents. I make no finding as to whether most of the charges are proven or unproven, but I do find that as to all assertions made by defendant there is cause for concern that the prosecutor's conduct before the grand jury may require dismissal of the indictment. The accusations are made sincerely; there is some evidence to support all of them, and there is quite a bit of evidence to support some. However, before factual findings can be made, a further hearing permitting participation by all parties interested in the grand jury proceedings is necessary—something which will be explained later. Most importantly, of course, the testimony of government counsel is essential, and it is still missing although all three of the lawyers were in Denver during the last hearing.

Because that additional hearing is required, I shorten discussion of most of the claims of prosecutorial misconduct, but I shall comment briefly on them. Frequently I will phrase the charges as if the facts had been established, but I emphasize that I am not saying that the facts have been proven. I am just adopting the practice of the gove ment in phrasing an indictment in language saying that thus and so are the facts. I am only phrasing the defendant's charges against the government in the same way the government phrases its charges against a defendant, and the fact that the charges are made is not evidence that they are true, nor do I find that they are.

Richard Birchall is a lawyer formerly with the Tax Division who practices in New Jersey and who did some

work for defendant and his company. He was subpoenaed to testify before the grand jury, and he showed up in Denver pursuant to the subpoena. He says that he met Mr. Snyder and the agents in a bar and they downed a few drinks paid for by Mr. Snyder. During this session Mr. Snyder supposedly disregarded the secrecy rules and, having done so, he told Mr. Birchall he was a potential target. He added that there was testimony about a personal relationship of Mr. Birchall's, a comment which was bothersome to the witness because of marital problems of Mr. Birchall. These communications are of a nature (if they were made) designed to bring about hurried cooperation from a witness, and especially from a witness who is a former Tax Division lawyer practicing tax law in the private sector. While in Denver, Mr. Birchall was left in a room with some grand jury transcripts and material lying on a table in plain sight. Mr. Birchall scanned some of the material trying to locate that which dealt with the matters discussed by Mr. Snyder. Perhaps he shouldn't have done this, but this is a matter of morals while grand jury secrecy is a matter covered by Rule 6, and Mr. Snyder was under it, but Mr. Birchall wasn't. Moreover, Mr. Birchall testified that he thought that he was being threatened by Mr. Snyder, and he was reacting to the threats. I pass no moral judgment on what happened because that's not the question to be decided in this case.

This doesn't end the accusations made through Mr. Birchall's testimony. He said that Mr. Snyder tried to persuade him to breach his ethical duty of confidentiality and he attributed to Mr. Snyder a remark that even if the defendant wasn't guilty, the government would "break him" with the cost of the defense. These accusations go to the heart of our system of justice, and it was no ploy on the part of defense counsel to bring the accusations out for public scrutiny.

Professor Roland Hjorth teaches tax law at the University of Washington Law School, and he is a recog-

nized expert who was employed by defense counsel on the recommendation of the professor of tax law at the University of Michigan. At the request of defendant, Professor Hjorth was permitted to testify as an expert before the grand jury. His views of tax law differed markedly from those of Mr. Snyder, who bragged on frequent occasions that he had never taken a course in taxation and knew almost nothing about it. Nevertheless, Professor Hjorth was browbeaten and ridiculed by Mr. Snyder, and some of the conversation so out of place for an ethical prosecutor took place during a recess in the hearing of some grand jurors. The government's post trial brief says as to this breach of ethics and standards of common courtesy:

> "It was poor judgment on the part of Mr. Snyder to carry on a conversation with Professor Hjorth while two grand jurors were present. However, the record fact is that there was no disclosure of Grand Jury material during the conversation."

I'm not so sure about that. The record shows that the argument and ridicule was as to that which Professor Hjorth had testified to, and that persons other than grand jurors could hear the argument. However, even if the government is correct in this statement, the fact is that the argument bégs the real question. Professor Hjorth also testified that as a result of Mr. Snyder's conduct, he would never again appear as an expert witness. Intimidating witnesses by telling them that their testimony disgraces them and implying that the Tax Division of the Department of Justice will take after the witness and will complain to the University of Washington Law School because an expert testified to his expert opinions does no credit to our government. I think that the government's argument in its post trial brief is unconvincing, and, seemingly, the professor's testimony isn't seriously contested. I hope that we haven't gotten to the point that disagreement with the legal concepts of the

IRS provides grounds for attacks by that bureaucracy because sometimes the IRS is wrong. *U.S. v. Sells Engineering* (1983) —— U.S. ——, 103 S.Ct. 3133, 77 L.Ed. 2d 743 and *U.S. v. Baggot*, —— U.S. ——, 103 S.Ct. 3164, 77 L.Ed.2d 785.

Peter Parrish is a former IRS agent who is now employed as an accountant and who worked for defendant. He said that when he responded to a subpoena, he was interviewed by Mr. Blondin and matters which took place before the grand jury were discussed. He also said that the discussions could be heard by outsiders. I don't approve this casual approach to witness interviews, but I think that the incident is picayune. It doesn't deserve discussion.

To further muddle the status of the Special Agent/Grand Jury Agent/Assistant to the Prosecutor matter, letters were written on the letterhead of the United States Attorney for the District of Colorado, and they were signed by the IRS agents with an explanatory line under their signature saying that they were "Special Agents". The letters were authorized by Justice Department attorneys, but they were not authorized by the United States Attorney in Colorado. Apart from the fact that IRS agents who claim to be "agents of the grand jury" shouldn't be using the U.S. Attorney's letterhead, the identity of the persons and the transactions which were under grand jury scrutiny shouldn't be disclosed to anyone by letter or otherwise, but these startling letters did precisely that. I can't fault the IRS agents for this because the government's brief says as to these singular letters:

> "Mr. Blondin and Mr. Snyder on these occasions asked the agents to send out correspondence and to sign the letters for them, after having the contents of the letter read to them over the phone. On no occasion, did the agents who were acting under the direction and control of Mr. Snyder, Mr. Blondin and

> the United States Attorney's Office sign any such letters without advance authority from the government's attorneys."

The United States Attorney for the District of Colorado has disavowed the letters written on his letterhead, and he has seen to it that this won't happen again.

Thus, the disclosures were made with knowledge of Tax Division lawyers and the IRS agent signatures on U.S. Attorney stationery were approved by them. The government has cited no authority for this novel procedure by which the nature of that which was going on before the grand jury and the identity of a target was certified to in writing on the letterhead of the U.S. Attorney who was not running the investigation. Once more, I attribute no fault to the U.S. Attorney.

In recent years, the use of "pocket immunity" has become prevalent. The phrase, for the benefit of the uninitiated, refers to a practice of ignoring the Congressional mandate as to how immunity can be granted and instead of doing what Congress commands, informally substituting a "deal" struck between a prosecutor and a witness. The enforceability of the side agreement in the federal court is an open question, but I have never heard it even argued that federal pocket immunity applies to a state court prosecution. However, when it is coyly suggested that a lawyer's client is a target of a grand jury inquiry and that the client can escape the range of fire by incriminating himself along with someone else, the carrot proffered by the prosecutor is hard to resist. Not unimportant, of course, is the fact that the pocket immunity need not be included in statistical reports showing the number of immunities granted in federal prosecutions. (These statistics have been of interest to Congress in the past, and I believe that they still are.)

The deal is a good one for both sides, but it skirts the law. It can be granted on a local level by lawyers not

authorized to approve the grant of formal immunity, and no report of its use is required. Formal immunity would have required the approval of the United States Attorney and a designated Assistant Attorney General. But pocket immunity can be granted at the whim of any lawyer running a grand jury, and there is no public record of the side deal. Here, the United States Attorney didn't authorize nor did he approve the immunities. In fact, he didn't know anything about them, although statutory immunity requires his okay.

The history of immunity statutes, colonial, state and federal, is set out in footnotes to *Kastigar v. United States* (1972) 406 U.S. 441, 92 S.Ct. 1653, 32 L.Ed.2d 212, and the present immunity statute enacted in 1970 is there discussed, as is the Congressional intent in its enactment. The intent as to the formality of grants of immunity is quite plain. 18 U.S.C. § 6002 effectively recognizes privilege against self-incrimination up to the point "the person presiding over the proceeding communicates to the witness an order issued under this part," to testify. The preliminaries to obtaining such an order are spelled out in 18 U.S.C. § 6003, and they are:

> 1. There must be a request for the order *made by "the United States attorney for such district."*
>
> 2. The request by the United States Attorney for the immunity grant *must then be approved by "the Attorney General, the Deputy Attorney General, or any assistant Attorney General."*
>
> 3. There must be a certification that the testimony may be necessary for the public interest and that the witness has refused or is likely to refuse to testify because of his privilege against self-incrimination.

At that point, a district judge performs the ministerial act of signing the immunity order. *In re Corrugated Container Antitrust Litigation* (2nd Cir.1981) 644 F.2d 70, *In re Daley*, (7th Cir.1977), 549 F.2d 469. The order

typically tracks § 6002 and says that "no testimony or other information compelled under the order . . . may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order." This was the statute which was analyzed in *Kastigar v. United States* (1972), 406 U.S. 441, 92 S.Ct. 1653, 32 L.Ed.2d 212, in which the old case of *Counselman v. Hitchcock* (1982) 142 U.S. 547, 12 S.Ct. 195, 35 L.Ed. 1110, was explained and distinguished. In *Kastigar* it was held that the statute did not grant transactional immunity and that the grant was limited to use. "The statute, like the Fifth Amendment, grants neither pardon nor amnesty. Both the statute, like the Fifth Amendment allow the government to prosecute using evidence from legitimate independent sources." When the statute is followed, there is a formal, understandable record of the immunity granted and its extent, but, with pocket immunity, no one is sure what the deal is, and there is no adequate record—statistical or otherwise. An underlying purpose of the statute is to reduce to written record the identities of persons granted immunity to permit necessary comparison at a later time of their relative guilt, as compared with persons not let off the hook. With the informal pocket immunity, only a few of the grants come to light, and clear Congressional purpose behind the law is defeated. The statute cannot be read to mean anything other than a limitation on immunity grants to requests made by a "United States Attorney", approved by "the Attorney General, the Deputy Attorney General, or any assistant Attorney General". Congress did not delegate to Tax Division Assistants any right to formally or to informally deal out immunity to the objects of their bounty, but here persons identified as targets of the grand jury were later bargained out of the case by Messrs. Snyder and Blondin. Whether there was any approval of the gifts of pocket immunity, and if so, by whom, I know not, but I do know that there was not compliance with 18 U.S.C. §§ 6002-

6003, and I do know that the United States Attorney did not authorize the pocket immunities granted by Tax Division lawyers.

This is especially troublesome in this case in light of the record made concerning the witness Richard Bell who was allegedly targeted by the grand jury (or at least by Mr. Snyder and Mr. Blondin). Mr. Bell was represented by his brother, Malcolm, an attorney practicing in New York City, and a witness I found to be straightforward, fair, convincing, and most generous to Mr. Snyder. Malcolm Bell succumbed to the carrot of pocket immunity for his brother, but, later he was told by Mr. Snyder that if Richard "testified for Mr. Kilpatrick, all bets are off." Maybe this meant that if Mr. Bell perjured himself he would be prosecuted for perjury, but if the immunity statute had been followed, the nagging question of the meaning of "all bets are off" wouldn't confront us. Under the statute, all bets weren't off if Richard Bell testified for Mr. Kilpatrick, although he could have been prosecuted for perjury if he testified falsely, but incriminating testimony given by him couldn't be used in a prosecution of the charges with which he was threatened. If the statute had been followed, the government couldn't welch on the bet of not using any incriminating testimony and I doubt that it can welch on that bet when the immunity grant is in pocket form. All too often, pocket immunities are carelessly granted, and sometimes they grant transactional immunity which Congress has not authorized. It is not surprising that there was uncertainty and misunderstanding in this instance. Grand jurors can't be expected to know the requirements of law concerning lawful immunity grants, and if the prosecutor ignores the statute, the grand jury should be told that witnesses are testifying under a side deal made with the witness by the prosecutor. The nature and informality of the immunity grant might bear on a grand juror's evaluation of the credibility of a witness, especially if the grand juror knew of the short cut used by the prosecution.

James Treece is a former United States Attorney for the District of Colorado. He was representing one of the targets of the grand jury investigation, and he was served with a subpoena duces tecum to produce records before the grand jury. He told the IRS Special Agent/Grand Jury Agent/Assistant to the prosecutor who served him that he had no such records in his possession, to which the agent, speaking in which capacity I know not, responded, "You're a liar." I guess that at this point this "man of many occupations" decided to act as a grand juror and pass on credibility. That this was said is denied, but I cannot disregard the testimony. I have no knowledge that any such comment was communicated to the grand jury, but Mr. Treece was required to testify after being called a liar by the "grand jury agent", and although I doubt that Mr. Treece was intimidated, other witnesses would have been.

We have not one but two problems under *Massiah v. United States*, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246. With full knowledge that he was represented by counsel, Declan O'Donnell appeared before the grand jury against the advice of his counsel, and that advice was known to the prosecutors. The government argues that O'Donnell was a lawyer and that he appeared voluntarily. I don't think that this is any answer to *Massiah*, although I concede that the case deals with an indicted defendant and O'Donnell was not then indicted. The government excuses its conduct saying it is permitted under *Edwards v. Arizona*, 451 U.S. 477, 478, 101 S.Ct. 1880, 1881, 68 L.Ed.2d 378. I don't think that *Edwards v. Arizona* is apposite. That case has to do with *Miranda* rights, and, although the government asks that I read footnote 9 of the opinion, I think that footnote 8 has more to do with the *Massiah* problem. I do not rule that there was or was not a violation of *Massiah* in the case of Mr. O'Donnell's testimony before the grand jury because such a ruling is not necessary to this memorandum, but defendant's argument isn't frivolous.

Robert G. Morvillo is a prominent lawyer practicing in New York City, and his testimony was taken by telephone. He represented the Bank of Nova Scotia, and he testified concerning the activities of Mr. Scharf in going to Puerto Rico to play cop in a further and total blurring of the distinction between prosecutor and investigator. In its brief, the government sees no impropriety in this conduct, but I remind of the Advisory Committee's comment that "Federal crimes are 'investigated' by the FBI, the IRS or by Treasury Agents and not by *government prosecutors* or the citizens who sit on grand juries." (They surely aren't investigated by "reviewers", something next to be discussed.) In any event, I have no doubt that when a prosecutor turns cop, he loses his *Imbler v. Pachtman*, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 prosecutorial immunity.

While in Puerto Rico, Mr. Scharf conducted a surveillance of some little girls and tailed them to their home. This let him question their mother as to the whereabouts of his prey who happened to be her husband, and who is a Bank of Nova Scotia employee. Of course, Mr. Scharf must have known that the wife couldn't have been compelled to testify to her husband's whereabouts, even under the lessened privilege adopted in *Trammel v. United States*, 445 U.S. 40, 100 S.Ct. 906, 63 L.Ed.2d 186. As an investigative technique tailing the little girls and quizzing the wife may have been brilliant police work, but I am quizzical as to the propriety of a lawyer questioning someone he knows he couldn't question in court because of an absolute privilege which, according to *Trammel*, can be waived only with full knowledge of the incompetence to testify. It seems to me that whatever may be the obligations of an IRS agent, a prosecutor owes a duty not to question a wife about her husband's whereabouts unless *Berger v. United States*, 295 U.S. 78, 55 S.Ct. 629, 79 L.Ed. 1314 has been overruled, and it hasn't been. Totally apart from the propriety of Mr. Scharf's actions in Puerto Rico under *Trammel*, the witnesses were employees of the

Bank of Nova Scotia, well known to Mr. Scharf to be represented by Mr. Morvillo. He says that interviews conducted by Mr. Scharf violate *Massiah*; the government says they don't, and I express no judgment as to who is right or wrong, but undeniably, there is a problem, and I think that the problem was well known to Mr. Scharf when he visited Puerto Rico.

Next we come to still another confusion in who occupied what job. It seems that within the administrative procedures of the Department of Justice sometimes conferences can be arranged with "reviewers" who are higher ups in the Tax Division. Many lawyers are of the impression that the 'reviewers" occupy a sort of quasi-judicial capacity to pass judgment on whether a case should be prosecuted, and that they are pretty much like the Appellate Staff on the civil side of the Tax Division. Experienced tax lawyers think that a "reviewer" is someone with whom compromise can be discussed. Moreover, from time immemorial, lawyers have dealt with one another in trying to settle cases in the belief that they can be straightforward without having their words thrown back at them at time of trial. The IRS hasn't always shared this view, and problems with the IRS played no small part in the enlargement of the coverage of the common law rule by the enactment of Rule 408 of the Federal Rules of Evidence. That rule now provides, "Evidence of conduct or statements made in compromise negotiations is likewise not admissable."

During the troubled history of this case, some lawyers were and some were not afforded the luxury of a conference with a "reviewer". Experienced tax lawyers think that a conference with a Reviewer offers a last ditch opportunity to avoid a criminal prosecution through negotiation, and memoranda are submitted to the Reviewer to analyze defense counsel's legal position. Conferences are then set up, attended by IRS agents, trial attorneys for the government, and defense counsel to present arguments

pro and con for more or less impartial consideration by the Reviewer. Counsel for some targets were and some were not favored with a conference with a Reviewer, but those who were so favored met with one Jared Scharf acting as the Reviewer. Something which was not disclosed to defense counsel was that he was a behind the scenes prosecutor, and, not only was he a behind the scenes prosecutor, he was actually an investigator in the case.

Rule 6(e) says that the grand jury transcript shall "remain in custody or control of the attorney for the government". The transcript of this grand jury was in the custody and control of the IRS. After the indictments were handed down, the transcript was stored away from the United States Courthouse in a room obtained from the General Services Administration by the Internal Revenue Service. It was a room assigned to the IRS, and, if the United States Attorney wanted in, he would have had to get a key from the IRS Special Agents. One cannot help fretting about this violation of the express language of the rule, and *United States v. Sells Engineering, Inc.*, —— U.S. ——, 103 S.Ct. 3133, 77 L.Ed.2d 743, coupled with *United States v. Baggot*, —— U.S. ——, 103 S.Ct. 3164, 77 L.Ed.2d 785, decided a few weeks ago, don't lessen the concern as to why the IRS retained custody of the transcripts which the rule unambiguously says should be under the control of the United States Attorney and only the United States Attorney.

There is testimony that Mr. Snyder threw his jacket on the floor and mouthed obscenities at me as I left the bench. I didn't see anything like that, and the conduct is denied. I don't know whether he did or didn't do any such thing.

When I recessed court one day, the players were in their usual positions. Mr. Snyder, Mr. Blondin, Ms. Surbaugh, and an IRS agent were seated at plaintiff's table. Mr. Scharf was in his bleacher seat, a couple of rows back in the spectator's section where he always sat while

the jury was in the courtroom. It was only when the jury left the courtroom that he sat at the counsel table and became an active trial participant. Because of suspicions I had based on testimony in the case (suspicions enhanced by post trial testimony) I was concerned about possible violations of *Massiah*, and I cautioned one and all that I didn't want the rule violated. I started to leave the bench, and Mr. Scharf yelled at me (he says that he spoke in a loud voice, but the dictionary I have suggests that the difference between a loud voice and a yell is quibble). Mr. Scharf's discourtesy amused me more than it offended me, but according to that which has been said in the post trial hearings, members of the public were distressed that a government lawyer would shout at the judge from the spectator's section of the courtroom. I thought that my court reporter's comment as we left the courtroom was discerning. She said that if her five year old son did something like that he would be sent to bed without his supper.

Rule 6(e) was amended to change the procedure for disclosure of grand jury information to "such government personnel as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce the criminal law." No court permission for the disclosure is required, and the rule is complied with if the attorney for the government "promptly provide(s) the district court . . . with the names of the persons to whom such disclosure is made." As I read it, any "attorney for the government" can promptly provide the information, and any "attorney for the government" can make the decision to disclose. I have no fault to find with the paper trail left in this matter insofar as the disclosure requirements are concerned. I am troubled about testimony suggesting that authority to make the disclosure decisions was delegated to the IRS Special Agent/Grand Jury Agents/Prosecutor's helpers. Under

common law rules of agency, this authority couldn't be delegated to a subagent, and, especially it couldn't be delegated to an IRS agent whose fellow workers were aiming at the defendants from a different angle. My worry on this score is not lessened by an IRS letter in evidence saying that making a civil tax case under the administrative process would be difficult. *United States v. Sells Engineering* and *United States v. Baggot*, both *supra*, which settle the question of using a grand jury to collect taxes.

At the post trial hearing, Donald D'Amico, a witness called by the government, testified as to his appearance before the grand jury. He said that in the presence of the grand jury, Mr. Snyder threw his arm around his shoulder and whispered, "Don't let them cut you up." Then Mr. Snyder introduced him to the grand jury with a glowing recitation of Mr. D'Amico's war record and said, "We have a genuine war hero." After that, Mr. Snyder read off a list of names and asked if the witness would take the Fifth Amendment if inquiry was made concerning those persons. Upon receiving an affirmative answer, the witness was excused from further testimony, and it was not until the post trial hearing that Mr. D'Amico received oral pocket immunity. From what was said at the hearing I glean that counsel for Mr. D'Amico had discussed the grand jury testimony before the witness was called, and why he was called just to claim his privilege remains unexplained.

Bernard Bailor was called as a witness by the government. He is a lawyer of long experience with the Tax Division of the Department of Justice, and I was impressed with his knowledge and with his candor. He said that if a case is being prosecuted by a United States Attorney, it is not unheard of to have a Reviewer assigned to assist in a trial if the United States Attorney so requests, but that when a case is being prosecuted by Tax Division lawyers, it would be most unusual to have

a Reviewer act as a trial attorney. He also summarized the security given grand jury material in a major case he handled, and that security was far greater than the security in this case. He made the statement that abuse of the grand jury process should bring about a dismissal of the indictment.

I think that I have talked enough about the grand jury to explain why I think there has been more than an "adequate showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury." There is such a motion, and, accordingly, I act under the provisions of Rule 6(e)(3)(C) which says that disclosure of grand jury matters may be made "when permitted by the court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury." The Advisory Committee note to Rule 6 requires a "preliminary factual showing of serious misconduct" and I am convinced that the requirement has been met. I guess that technically, the requisite "request" to examine the entire grand jury transcript hasn't been made, but in light of this memorandum, I am sure that it will be. I have scanned the transcript, but I haven't had time to study it, and, even if I had the time, nuances recognizable by counsel wouldn't be apparent to me. Because of the showing made as to the claims of prosecutorial conduct, and without finally ruling that there was or was not any such misconduct, I order that the entire grand jury transcript dealing with this indictment be made available for study by defense counsel. Defense counsel say that a grand juror who is also a lawyer, if permitted, would testify that Mr. Snyder oppressed witnesses before the grand jury and that he was overbearing and discourteous. I leave to another judge to decide whether this evidence should be received.

The rule says, "If the court orders disclosure of matters occurring before the grand jury, the disclosure shall be made in such manner, at such time, and under such conditions as the court may direct." The conditions follow: Disclosure shall be made to counsel and only to counsel. Paralegals shall not be used as substitute lawyers, and only members of the bar shall examine the transcript. They shall hold secret matters they learn, and they shall discuss them with no one other than co-counsel, and, insofar as necessary to the preparation of their arguments, with their clients. Typists given direct or indirect information concerning the content of the transcript shall receipt for a copy of a written order commanding that they hold secret any information learned by them as to what took place before the grand jury, and those receipted orders shall be filed with the clerk. During the time a transcript is being used to prepare arguments in this case, counsel shall be personally responsible for its secrecy, and when not in actual use, the transcript shall be placed in locked storage to which only counsel have access. When need for the transcripts no longer exist, all copies of it shall be returned to the United States Attorney to remain in his custody and control. All briefs disclosing grand jury testimony shall be sealed.

I make this ruling because I think that disclosure of the transcript is necessary in the interest of justice, and I make it because of recent action by the United States Court of Appeals for the Tenth Circuit. I also have in mind that which I anticipate the future holds in store for me. I noted earlier that Judge Kane has dismissed all except one count of the indictment, and the government has appealed his ruling. Because the prosecutorial misconduct, if proven, may result in a dismissal of the entire indictment, the Court of Appeals has ordered a partial remand to permit full development of the facts by all defendants. The remand is of such recent date

that other defendants cannot be adequately prepared, and they should be permitted to participate in the matter to whatever extent they desire. They may be satisfied with the record made, or they may want to expand on it. Even defendant Kilpatrick's lawyers may want to expand the record after reading the full transcript. I cannot, and I do not rule on the motion to dismiss. I earlier asked for suggestions as to remedy, and the government has said that suggestions are premature. I think that is correct. Dismissal is a possibility under a theory of a totality of the circumstances, and it is because proof of repeated misconduct is necessary to order dismissal that I have discussed the many accusations. See, *U.S. v. Gold*, (1979) D.C.Ill. 470 F.Supp. 1336. But dismissal is a last resort seldom used. *U.S. v. Narciso* (1976) D.C.Mich. 446 F.Supp. 252. Contempt is a possibility, and it is the remedy usually suggested. See, *U.S. v. Hoffa* (6th Cir.1965) 349 F.2d 20, *U.S. v. Dunham Concrete Products* (5th Cir. 1973) 475 F.2d 1241, *U.S. v. District Court* (4th Cir.1956) 238 F.2d 713. Disciplinary proceedings are a possibility, and the government has advised that "all of the allegations under consideration have been referred to the Office of Professional Responsibility" of the Department of Justice. Our local committee on conduct would also have jurisdiction of some of the matters.

Because further hearings are essential to a ruling on the motions to dismiss, and, perhaps, because Rule 605 of the Rules of Evidence, but more importantly because I plan to quit the judging business before the hearings can be completed, I make no ruling on and I intimate no belief as to what should be done with the dismissal motions. This decision will have to be made by Judge Kane, as will all other decisions concerning remedy.

No defendant other than defendant Kilpatrick is interested in the motion for new trial, and I am the only judge who should rule on it because I was there and

watched in amazement the trial's conduct. But little discussion is necessary to this ruling. I have talked about the testimony of Richard Bell and his brother. I heard that testimony outside the presence of the jury, and I wouldn't let the jury hear it. I think that was an error, and I don't think that I should put the parties to the expense of having the Court of Appeals tell me it was error. The witness was a key to the prosecution's case, and testimony as to the alleged pressures was important to an evaluation of his credibility. The pocket immunity and the circumstances of its grant bear on credibility. I initially thought that the testimony went only to prosecutorial misconduct which is for the court to determine, and I overlooked the credibility aspect of the implied threat coupled with the pocket immunity grant just as I overlooked the right of the jury to know that immunity wasn't granted the way Congress says it shall be. The jury should have heard the testimony and it might have changed some juror's mind. As a trial lawyer I didn't like the phrase "harmless error", and as a trial judge I don't use it when the error has any substance at all. This error has substance.

One Wilson Quintela was subpoenaed by the government, and he was arrested as a material witness. The prosecutors exercised a power possessed only by the court, and they released the man from subpoena. He promptly returned to his home in Brazil. Lawyers can't substitute themselves for the court to release a witness from subpoena. *U.S. v. Sanchez* (2nd Cir. 1972) 459 F.2d 100. At the time of trial, the government admitted that their conduct was in error, and every effort was made to get the witness to come back from Brazil when defense counsel said that he was relying on the availability of the witness. After the trial started, the government said that the witness would return, but defense counsel said at that point he had developed his trial strategy on the basis of the release of the witness from the subpoena.

He may have correctly thought that an interruption of the trial to permit travel from Brazil would be detrimental. That the government was guilty of no evil intent I am sure, but that the defendant suffered no harm I am not sure. Standing alone, this is one mistake I might reluctantly say was "harmless error", but coupled with other things, I can't so rule.

If there is any one thing that Tenth Circuit has been vehement about it is expressions of personal opinions by counsel as to whose testimony they believe. That rule was violated here, and I suggest that a review of the grand jury transcript may show frequent violations of the rule during grand jury proceedings. My thinking on this score goes immediately to the appearance of Professor Hjorth before the grand jury. I jumped in during final argument to try to lessen the error of the comment, but I doubt that I cured it.

It is argued that in the presence of the jury one of the agents stared at and laughed at the defendant. The prosecution says that this didn't happen, and that if it did, I would have seen it. I didn't see it, but that doesn't mean that it didn't happen, because no judge sees everything which goes on in a courtroom. This is especially so because I was concentrating my attention on Mr. Scharf's glowering as he sat in the second row of the spectator's section, and I doubt that defense counsel could see him. I mention this only because it is one more tiny aspect of the atmosphere of the trial. It was an atmosphere of unfairness and overreaching illustrated in small degree by ex parte telephone calls to my law clerk made by government counsel inquiring through the back door to learn my thinking as to some legal situations in the case. (Colloquy about this appears in the record, and, consistent with their denials of what so many others say, government counsel deny my law clerk's statements as to the conversation.) The case is the only trial I have ever conducted in which the courtroom deputy complained

about discourtesy on the part of counsel, and I suppose that it goes without saying that it was not defense counsel who were discourteous. (An apology by government lawyers was extended later.)

Other arguments are advanced supporting the new trial motion, but I don't think that I need extend this opinion by discussing them. I have taken them into account in my thinking. Usually, when a case goes to the jury, there are no more difficulties to be encountered, but that's not so in this ill-starred case which had its first questionable conduct during the opening two minutes of grand jury investigation and which had conduct suspect under the Canons of Professional Responsibility lasting into post trial hearings. While the jury was deliberating a note was received. I notified counsel on both sides, and a hearing was held in open court with the defendant present, defense counsel present. Ms. Surbaugh of Colorado's United States Attorney's Office, and Mr. Blondin were there on behalf of the government. (Messrs. Scharf and Snyder didn't show up, although when the jury retired all counsel had been told to stand by for jury questions or a verdict). We discussed the answer which should be given to the jury, and we all agreed on it. The answer was written, and a copy was given to both sides.

I was more than a little surprised when a telephone call from Mr. Scharf was received a few minutes later. He had decided that he wasn't satisfied with that which those who saw fit to come to the hearing all agreed to. He demanded a further hearing, and I told him we would have one right away. He then made the most ridiculous demand I have ever heard in the almost 50 years since I graduated from law school. Mr. Scharf directed that I instruct the jury to "cease its deliberations" until he could have his hearing. This direction was made on the telephone and it was obviously not made in the presence of defendant or defense counsel. To accede to this absurd

demand would have created irretrievable error under Rule 43 and under *Rogers v. United States*, 422 U.S. 35, 95 S.Ct. 2091, 45 L.Ed.2d 1. That error I avoided because I told Mr. Scharf I wouldn't even consider obeying his command to instruct the jury to quit deliberating. We did have the hearing and it didn't take long. Exactly what was said at that time is part of the record in the case.

After the jury verdict, timely motions were filed, and it was apparent from a reading of them that Mr. Scharf, Mr. Blondin and Mr. Snyder were going to have to testify about matters raised in the motions. Their recognition of the factual dispute is clearly shown in the flippant brief filed in opposition to the motions. At the outset of the hearing I inquired concerning the ethical bind in which the prosecutors found themselves, and I asked if other counsel should not be handling the hearing. I admit to surprise when I was told that top lawyers in the Tax Division of the Department of Justice saw nothing wrong with the continued participation in the case of lawyers whose testimony was quite obviously going to be required. We started the hearing with participation by two of the lawyers who were essential witnesses. (One was said to be in trial somewhere else.) The hearing went for a little while, when, suddenly, there was a 180 degree change of direction, and government counsel announced that they wanted to withdraw. They were permitted to do so, and the hearing recessed. Mr. Alexander took over, and he has performed ably and ethically. However, he was handicapped by lack of time to prepare, and the hearing which I had hoped to complete weeks ago had to be continued for later testimony. We are still waiting for that testimony.

This brings us down to date. I have already explained that I cannot and I do not rule on the motion to dismiss, but I do grant the motion for a new trial. I deny the motion for judgment of acquittal, but I do so without

intent that this is the "law of the case", and leave it to another judge to take a fresh look at the motion if the case is tried again.

ORDER

Rule 6 of the Federal Rules of Criminal Procedure provides that matters occurring before a grand jury shall be secret, subject to a few exceptions. One exception is that there may be disclosure when directed by a court in connection with a judicial proceeding. I have directed that there be some disclosure of grand jury matters, and undoubtedly, typists will have to learn what is contained in grand jury transcripts in the performance of their secretarial work for lawyers who read the transcripts. Accordingly, such disclosures as may be necessary to the accomplishment of secretarial duties is authorized, but any typist who so learns of any such grand jury matters is ordered to keep secret such information. Rule 6 itself provides that violation of the secrecy requirements of the rule may be deemed contempt of court, and violation of this order may be deemed contempt of court.

APPENDIX F

STATUTES AND RULES INVOLVED

18 U.S.C. Sec. 6002. IMMUNITY GENERALLY

Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—

(1) a court or grand jury of the United States,

(2) an agency of the United States, or

(3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House, and the person presiding over the proceeding communicates to the witness an order issued under this part [18 USC §§ 6001 et seq.], the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

18 U.S.C. Sec. 6003. COURT AND GRAND JURY PROCEEDINGS

(a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a court of the United States or a grand jury of the United States, the United States district court for the judicial district in which the proceeding is or may be held shall issue, in accordance with subsection (b) of this section, upon the request of the United States attorney for such district, an order requiring such individual to give testimony or provide other information which he refuses to give or pro-

vide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this part [18 U.S.C. § 6002].

Federal Rules of Criminal Procedure, Rule 6(d). WHO MAY BE PRESENT

Attorneys for the government, the witness under examination, interpreters when needed and, for the purpose of taking the evidence, a stenographer or operator of a recording device may be present while the grand jury is in session, but no person other than the jurors may be present while the grand jury is deliberating or voting.

Federal Rules of Criminal Procedure, Rule 6(e). SECRECY OF PROCEEDINGS AND DISCLOSURE

(1) General rule. A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the Government, or any person to whom disclosure is made under paragraph (2)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of rule 6 may be punished as a contempt of court.

(2) Exceptions.

(A) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than its deliberations and the vote of any grand juror, may be made to—

(i) an attorney for the government for use in the performance of such attorney's duty; and

(ii) such government personnel as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce Federal criminal law.

(B) Any person to whom matters are disclosed under subparagraph (A)(ii) of this paragraph shall not utilize that grand jury material for any purpose other than assisting the attorney for the government in the performance of such attorney's duty to enforce Federal criminal law. An attorney for the government shall promptly provide the district court, before which was impaneled the grand jury whose material has been so disclosed, with the names of the persons to whom such disclosure has been made.

(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made—

(i) when so directed by a court preliminarily to or in connection with a judicial proceeding; or

(ii) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury.

(3) Sealed indictments. The Federal magistrate to whom an indictment is returned may direct that the indictment be kept secret until the defendant is in custody or has been released pending trial. Thereupon the clerk shall seal the indictment and no person shall disclose the return of the indictment except when necessary for the issuance and execution of a warrant or summons.

Nos. 87-578 and 87-602

Supreme Court, U.S.
FILED
DEC 14 1987
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1987

THE BANK OF NOVA SCOTIA, PETITIONER

v.

UNITED STATES OF AMERICA

WILLIAM A. KILPATRICK, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General

WILLIAM S. ROSE, JR.
Assistant Attorney General

GARY R. ALLEN
ROBERT E. LINDSAY
ALAN HECHTKOPF
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether a district court has authority to dismiss an indictment for alleged grand jury abuse in the absence of prejudice.

2. Whether a district court's holding that the independent judgment of the grand jury has been infringed is subject to de novo review.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	7
Conclusion	16

TABLE OF AUTHORITIES

Cases:

Anderson v. *Bessemer City*, 470 U.S. 564 (1985)	15
Application of Eisenberg, In re, 654 F.2d 1107 (5th Cir. 1981)	6
Bast v. *United States*, 542 F.2d 893 (4th Cir. 1976)	6
Maine v. *Taylor*, 477 U.S. 131 (1986)	15
Pullman-Standard v. *Swint*, 456 U.S. 273 (1982)	15
Rose v. *Clark*, No. 84-1974 (July 2, 1986)	10
Strictland v. *Washington*, 466 U.S. 668 (1984)	15
United States v. *Bari*, 750 F.2d 1169 (2d Cir. 1984), cert. denied, 472 U.S. 1019 (1985)	13
United States v. *De Rosa*, 783 F.2d 1401 (9th Cir.), cert. denied, 477 U.S. 908 (1986)	14
United States v. *Dyman*, 739 F.2d 762 (2d Cir. 1984), cert. denied, 469 U.S. 1193 (1985)	13
United States v. *Estepa*, 471 F.2d 1132 (2d Cir. 1972)	12
United States v. *Hasting*, 461 U.S. 499 (1983)	7, 8, 9
United States v. *Hogan*, 712 F.2d 757 (2d Cir. 1983)	13
United States v. *Holloway*, 778 F.2d 653 (11th Cir. 1985), cert. denied, 476 U.S. 458 (1986)	12
United States v. *Jacobs*, 531 F.2d 87 (2d Cir.), vacated, 429 U.S. 909, on remand, 547 F.2d 772 (2d Cir. 1976), cert. dismissed, 436 U.S. 31 (1978)	12
United States v. *Lehman*, 792 F.2d 899 (9th Cir. 1986), cert. denied, No. 86-5331 (Oct. 6, 1986)	15
United States v. *Martino*, 825 F.2d 754 (3d Cir. 1987)	11
United States v. *McCord*, 509 F.2d 334 (D.C. Cir. 1974), cert. denied, 421 U.S. 930 (1975)	12
United States v. *Mechanik*, 475 U.S. 66 (1986)	7, 9
United States v. *Morrison*, 449 U.S. 361 (1981)	7, 8, 12
United States v. *O'Keefe*, 825 F.2d 314 (11th Cir. 1987)	12

Cases—Continued: Page

United States v. *Sears, Roebuck & Co.*, 719 F.2d 1386 (9th Cir. 1983), cert. denied, 465 U.S. 1079 (1984) 14
Vasquez v. *Hillery*, 474 U.S. 254 (1986) 10, 11
Young v. *United States ex rel. Vuitton ET Fils., S.A.*, No. 85-1329 (May 26, 1987) 10

Constitution, statutes and rule:

U.S. Const.:
Amend. IV 8
Amend. V 3, 6, 8, 10
Amend. VI 3, 8
18 U.S.C. 371 2
18 U.S.C. 1341 2
18 U.S.C. 1503 2
18 U.S.C. 6002 3
18 U.S.C. 6003 3
26 U.S.C. 7206(1) 2
26 U.S.C. 7206(2) 2
Fed. R. Crim. P.:
Rule 6(d) 3, 4, 5, 9, 11
Rule 6(e) 3, 4
Rule 6(e)(2) 6

In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-578

THE BANK OF NOVA SCOTIA, PETITIONER

v.

UNITED STATES OF AMERICA

No. 87-602

WILLIAM A. KILPATRICK, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A41)[1] is reported at 821 F.2d 1456. The opinions of the district court (Pet. App. C1-C55, D1-D35) are reported at 594 F. Supp. 1324 and 575 F. Supp. 325.

JURISDICTION

The judgment of the court of appeals was entered on June 18, 1987. Petitions for rehearing were denied on August 19, 1987 (Pet. App. B1-B3). The petition for a writ

[1] "Pet. App." refers to the appendix to the petition in No. 87-578.

of certiorari in No. 87-578 was filed on October 9, 1987, and the petition in No. 87-602 was filed on October 13, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case stems from a 20-month investigation conducted by two successive grand juries. Two attorneys from the Tax Division of the Department of Justice assisted the grand juries in the investigation. The attorneys, in turn, were assisted by numerous personnel from the Internal Revenue Service. In September 1982, a 27-count indictment was returned charging petitioners and others (in various combinations) with conspiracy, in violation of 18 U.S.C. 371; willfully aiding and assisting in the preparation and presentation of false tax returns, in violation of 26 U.S.C. 7206(2); willfully making and subscribing false individual tax returns (Forms 1040), in violation of 26 U.S.C. 7206(1); mail fraud, in violation of 18 U.S.C. 1341; and obstruction of justice, in violation of 18 U.S.C. 1503.

The district court initially dismissed all but one of the counts for failure to state an offense. Petitioner Kilpatrick went to trial and was convicted on the one remaining count (obstruction of justice). The government appealed the dismissal of the other 26 counts. Before argument, the court of appeals granted a defense motion and partially remanded the case to the district court for the purpose of determining whether prosecutorial misconduct during the grand jury proceedings constituted another basis for dismissal. On remand, the district judge granted a new trial to petitioner Kilpatrick and ordered the disclosure of the grand jury transcripts. Because he was retiring from the bench, however, that district judge did not decide whether the indictment should be dismissed for pros-

ecutorial misconduct; instead, the cases were reassigned to another district judge. Pet. App. A2 & n.2, D26-D33.

The newly assigned judge, after conducting a 10-day hearing, dismissed all 27 counts of the indictment because of prosecutorial misconduct (Pet. App. A2, C54-C55). The court held that Fed. R. Crim. P. 6(e) was violated by the disclosure of grand jury material to IRS civil employees (Pet. App. C37-C40), by the failure of the government to provide prompt notice to the court of disclosures of grand jury material (*id.* at C38), by the disclosure to various potential witnesses of the names of targets of the investigation (*id.* at C40-C41), and by the prosecutors' instructions to two witnesses that they were not to reveal the fact that they had testified before the grand jury or the substance of their testimony (*id.* at C41). In addition, the court held that Fed. R. Crim. P. 6(d) was violated because IRS agents made joint appearances before the grand jury for the purpose of reading transcripts to the jurors (Pet. App. C7-C8, C35-C36).

The court also found that the prosecution engaged in misconduct by arguing with an expert witness, during a grand jury recess but within the hearing of some grand jurors, after the witness had given testimony favorable to the defense (Pet. App. C33-C34). Furthermore, the court held that the government violated the witness immunity statute (18 U.S.C. 6002, 6003) by the use of "pocket immunity" or "letters of assurance" (Pet. App. C44-C46). Moreover, it found that the government presented "questionable hearsay" to the grand jury (*id.* at C47), that it violated the Fifth Amendment because it called several witnesses for the sole purpose of having them assert their Fifth Amendment privilege (*id.* at C46-C47), and that it violated the Sixth Amendment by conducting post-indictment interviews of several high-level employees of the Bank of Nova Scotia without notifying counsel for the bank (*id.* at C47-C49). The court also found that the in-

dependence of the grand jury was compromised because IRS agents were sworn as "agent[s] of the grand jury" (*id.* at C3-C8).

The district court held that the indictment should be dismissed because of the Rule 6(d) and 6(e) violations and because of the "totality of the circumstances" underlying the indictment (Pet. App. C54-C55). The court found that the conduct of the government was prejudicial to the defendants because the grand jury "was converted into little more that a rubber stamp" (*id.* at C53-C54). In addition, it found that, wholly apart from any prejudice, dismissal was appropriate as an exercise of the court's "supervisory authority" (*id.* at C53).

2. The court of appeals reversed and remanded the case with directions to reinstate all the counts of the indictment (Pet. App. A1-A33). After first concluding that the indictment was legally sufficient (*id.* at A3-A11), the court addressed the standard of review to be applied to the trial court's findings. It indicated that the issue whether the government had engaged in specific acts of misconduct "involves questions of historical fact governed by the clearly erroneous standard" (*id.* at A15 (citations omitted)). It further concluded, however, that the issue "whether the independent judgment of the grand jury has been infringed" was one "involv[ing] the consideration of legal principles, calling for *de novo* review by the appellate court" (*id.* at A16). Applying that standard, the court held that dismissal of the indictment was inappropriate (*id.* at A29). The court further held that dismissal would be inappropriate even under the clearly erroneous standard urged by petitioners (*ibid.*; see *id.* at A15).

In reaching its decision, the court reviewed in detail the various grand jury violations found by the district court. It stated that, based on its review of the record, it was "not persuaded by the several reasons given for the dismissal" (Pet. App. A21). Thus, the court noted that the use of summaries of evidence is "permissible and often helpful,

especially in complicated cases such as this" (*ibid.*); it stated that the use of "informal immunity" was "entirely proper" and that, in any event, "the defendants have failed to show how the use of informal immunity prejudiced the grand jury" (*id.* at A22 (footnote and citation omitted)); and it held that the government's post-indictment questioning of bank employees "could not possibly have affected the grand jury's charging decision" (*ibid.*). The court also held that the presence of more than one IRS agent in the grand jury for the purpose of reading transcripts, while it violated Rule 6(d), did not warrant dismissal of the indictment because of the absence of prejudice from the violation (Pet. App. A22-A23).[2]

In addition, the court of appeals found no support for the district court's findings that government attorneys " 'relinquished to the IRS their responsibility to determine the persons to whom disclosure would be made' " (Pet. App. A23 (quoting district court opinion)) or that IRS agents "manipulated the grand jury" in order to obtain materials for use in civil litigation (*ibid.*). The court also noted that, "[a]ssuming that [the] allegation" of improper disclosure of grand jury materials to civil IRS agents "finds support in the record," the grand jury's independence was not "usurped in such a significant way as to amount to grand jury abuse" (*id.* at A24). In addition, the court noted that "[t]he aid of IRS experts was essential to a complete understanding of the case" and that "[t]he fact that some of the IRS personnel assigned to the grand jury investigation were from the civil division is by itself not sufficient to show grand jury abuse" (*ibid.*). The court cited the grand jury's return of a multi-count indictment as

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[2] The court noted the district court's finding that IRS agents had convened grand jury sessions without government attorneys being present, but it held that the finding was "not supported by the record" (Pet. App. A23 n.14).

"probative evidence that it was not abused to obtain evidence for civil purposes" (*id.* at A25 (footnote omitted)).

The court also held that the grand jury's independent judgment was not infringed by the fact that the identity of some of the targets of the investigation was disclosed to potential witnesses or that two witnesses were directed not to reveal the contents of their testimony (Pet. App. A25).[3] Regarding the term "agent of the grand jury" that was used in reference to certain IRS agents who were assisting in the investigation, the court—without deciding whether the use of that designation was improper—found that there was no showing of prejudice (*id.* at A25-A26). Similarly, the court found no basis for dismissal of the indictment based on the fact that several witnesses who intended to invoke the Fifth Amendment were called before the grand jury. The court noted that such an intention by witnesses "cannot be transformed into a prohibition against inquiry" and that "[o]nce the privilege was invoked on the record, the prosecutors discontinued all questioning." *Id.* at A26-A27 (footnote omitted). And the court found that the mistreatment of an expert witness during a grand jury recess, while not proper conduct, did not jeopardize the grand jury's independence (*id.* at A27).

The court noted that a "presumption of regularity * * * attaches to grand jury proceedings" (Pet. App. A27), and it found that petitioners had failed to overcome that presumption. The court observed that the grand jury transcripts reflect "an active, independent, and questioning grand jury, familiar with the record, one that thoughtfully questioned, rather than submitted to statements and suggestions of the Government attorneys" (*id.* at A27 & n.20 (citing numerous examples)). In addition, the court pointed out that, as reflected in the grand jury transcripts, "the prosecutors frequently reminded the grand jury of its independence and duty to make its own assessment of the evidence introduced before it" (*id.* at A27 n.20 (quoting examples)). The court noted that "[t]he district court erred in focusing primarily on the propriety of the Government's conduct rather than on possible interference with the integrity and independence of the grand jury" (*id.* at A27-A28).

Finally, the court held that the "drastic remedy of dismissal of an indictment, whether premised on due process or supervisory powers theories," could not be exercised in the absence of "a significant infringement on the grand jury's ability to exercise independent judgment" (Pet. App. A32 (footnote omitted)).

Judge Seymour dissented (Pet. App. A34-A41). In her view, a showing of prejudice to the defense is not required in order for a court to dismiss an indictment on the basis of its supervisory powers (*id.* at A34-A40). She believed that in the present case, "the district court was within its discretion in exercising its supervisory power to protect the integrity of the judicial process and to deter illegal conduct" (*id.* at A40-A41).

ARGUMENT

1. a. Petitioners' principal argument is that the court of appeals erred in holding that the district court could not dismiss the indictment in the absence of prejudice (87-578 Pet. 9-17; 87-602 Pet. 13-17). The court's holding, however, is entirely consistent with this Court's decisions in *United States* v. *Morrison*, 449 U.S. 361 (1981); *United States* v. *Hasting*, 461 U.S. 499 (1983); and *United States* v. *Mechanik*, 475 U.S. 66 (1986). In *Morrison*, the court

[3] Rule 6(e)(2), Fed. R. Crim. P., has been construed to mean that witnesses are not bound by the obligation of secrecy imposed on other participants in the grand jury proceeding. See *In re Application of Eisenberg*, 654 F.2d 1107, 1113 n.9 (5th Cir. 1981); *Bast* v. *United States*, 542 F.2d 893, 896 (4th Cir. 1976).

of appeals had reversed the defendant's conviction and dismissed the indictment, without any showing of prejudice, because her Sixth Amendment right to counsel had been violated by the efforts of government agents to disparage her attorney's representation. This Court unanimously reversed, holding that since the violation had no impact on the criminal proceedings, the remedy fashioned by the court of appeals was inappropriate (449 U.S. at 367). The Court stated (*id.* at 365 (footnote omitted)) that "absent demonstrable prejudice, or substantial threat thereof, dismissal of the indictment is plainly inappropriate, even though the violation may have been deliberate." The Court further noted (*ibid.*) that the requirement of prejudice applies not only in the Sixth Amendment context but also in the Fourth and Fifth Amendment contexts as well.[4]

In *Hasting*, the Court ruled that a court may not use its supervisory powers to reverse a conviction based on a prosecutor's improper comment on the defendant's failure to testify, without first determining if the alleged error is harmless. The Court noted (461 U.S. at 506) that "[s]upervisory power to reverse a conviction is not needed as a remedy when the error to which it is addressed is harmless since, by definition, the conviction would have been obtained notwithstanding the asserted error." And in

[4] The dissent below errs in stating that the Court in *Morrison* indicated that "a showing of prejudice is not required when the record reveals 'a pattern of recurring violations' " (Pet. App. A40 (quoting 449 U.S. at 366 n.2)). In fact, the Court left the issue open; it simply noted that "the record before us does not reveal a pattern of recurring violations by investigative officers that *might* warrant the imposition of a more extreme remedy in order to deter further lawlessness" (*ibid.* (emphasis added)). In any event, the record in this case does not show that the actions found by the court of appeals to be improper represent anything but isolated occurrences confined to this single case (see generally Pet. App. D2, D10).

Mechanik, the Court reversed the court of appeals' holding that a violation of Fed. R. Crim. P. 6(d) required automatic reversal of a subsequent conviction even in the absence of prejudice. The Court reasoned that the subsequent conviction rendered harmless any violation of Rule 6(d). In reaching its decision, the Court stated (475 U.S. at 71-72 (citations omitted)) that "Federal Rule of Criminal Procedure 52(a) provides that errors not affecting substantial rights shall be disregarded. We see no reason not to apply this provision to 'errors, defects, irregularities or variances' occurring before a grand jury just as we have applied it to such error occurring in the criminal trial itself."[5]

Thus, this Court's decisions suggest that a district court may not avoid the requirement of measuring the prejudicial effect of prosecutorial misconduct simply by employing its supervisory powers to dismiss an indictment, even where those powers are used for the salutary purpose of "disciplin[ing] the prosecutors of its jurisdiction" (*Hasting*, 461 U.S. at 505).

The Bank of Nova Scotia nonetheless contends (87-578 Pet. 13-16) that under *Hasting* and its progeny, a court may dismiss an indictment for harmless error where the in-

[5] The Bank of Nova Scotia errs in suggesting (87-578 Pet. 9-10) that the Court in *Mechanik* left open the question whether dismissal of an indictment prior to trial is proper in the absence of prejudice. In fact, the Court appears to have assumed that a showing of prejudice is required. Thus, early in its opinion, the Court "assume[d] for the sake of argument" that the violation of Rule 6(d) would have permitted the district court to dismiss portions of the indictment "*had there been actual prejudice* and had the matter been called to its attention before the commencement of the trial" (475 U.S. at 69-70 (emphasis added)). At the end of its opinion, the Court stated that it was "express[ing] no opinion as to what remedy may be appropriate for a violation of Rule 6(d) *that has affected the grand jury's charging decision* and is brought to the attention of the trial court before the commencement of trial" (475 U.S. at 72 (emphasis added; footnote omitted)).

terests underlying the supervisory power of courts outweigh the interests protected by the harmless error doctrine. However, while this Court has dispensed with harmless error analysis as to some types of errors, these situations are plainly the exceptions rather than the rule. See *Rose* v. *Clark*, No. 84-1974 (July 2, 1986), slip op. 8. Recent decisions of this Court make clear that courts must apply the harmless error doctrine where an error, even a constitutional one, is susceptible to meaningful harmless error analysis, does not necessarily render the factfinding process fundamentally unfair, and does not involve a right protecting fundamental values unrelated to the factfinding process. See *Rose*, slip op. 6-8; *Young* v. *United States ex rel. Vuitton ET Fils., S.A.*, No. 85-1329 (May 26, 1987), slip op. 21-26 (plurality opinion) (appointment of interested prosecutor raised doubt that prosecution could be conducted in a disinterested manner, created appearance of impropriety to which harmless error analysis would not have been sensitive, and did not lend itself to a ready assessment of its effects on the prosecution); *Vasquez* v. *Hillery*, 474 U.S. 254 (1986) (racial discrimination in selection of grand jurors struck at fundamental values of judicial system and society, and was not susceptible to evaluation of resulting harm).

The conduct at issue here falls within the general rule requiring a harmless error evaluation. None of the conduct alleged in this case rendered the grand jury's factfinding process so unfair that prejudice must be presumed.[6] More-

[6] Indeed, many of the actions at issue were found by the court of appeals to be entirely proper. For example, the court found nothing improper in the use of summaries of evidence or the granting of informal immunity (Pet. App. A21-A22). It also suggested that the government's calling of witnesses who asserted their Fifth Amendment privilege was permissible, since the prosecutors ceased questioning the witnesses after the privilege was invoked (*id.* at A26-A27). Similarly, the court stated that the use of IRS personnel from the civil division to assist in the investigation was "not sufficient to show grand jury abuse" and that "the fact that the grand jury returned an extensive indictment is probative evidence that it was not abused to obtain evidence for civil purposes" (*id.* at A24-A25 (footnote omitted)). See also Gov't C.A. Br. 7-38 (explaining that many of the alleged violations cited by the district court were either not violations at all or were at most technical violations of Rule 6(d) that did not compromise the grand jury's independence).

over, the conduct in question consisted of discrete acts whose nature was readily ascertainable from grand jury transcripts and testimony at the hearings in the district court. Thus, any improper conduct could be evaluated under a harmless error analysis with a view to determining whether it likely had an unfair impact on the grand jury's charging decision. Finally, unlike conduct such as racial discrimination in the selection of grand jurors, the conduct at issue here does not " 'strike[] at the fundamental values of our judicial system and our society as a whole' " (*Vasquez*, 474 U.S. at 262 (citation omitted)). Thus, the court of appeals' holding that dismissal of the indictment was not warranted in the absence of prejudice to the petitioners is fully consistent with—if not compelled by—various decisions of this Court.

b. Petitioners concede that the Fifth, Sixth, Eighth, Ninth, and Eleventh Circuits all require a showing of prejudice before an indictment may be dismissed (87-578 Pet. 12 (citing cases); 87-602 Pet. 17 (citing cases)). They contend (87-578 Pet. 12; 87-602 Pet. 16-17), however, that the present case conflicts with decisions of the Second, Third, and District of Columbia Circuits. That claim lacks merit.

The Third Circuit, citing *Hasting*, has recently taken the position that an indictment may not be dismissed for grand jury abuse in the absence of prejudice. *United States* v. *Martino*, 825 F.2d 754, 759-760 (1987). The court noted that, notwithstanding some of the language used in earlier Third Circuit cases, it in fact has "looked to prejudice" in "every case" (*id.* at 759). Thus, the Third Circuit's ap-

proach is now consistent with that of the court below.[7] Similarly, we know of no case in which the District of Columbia Circuit has dismissed an indictment for grand jury abuse in the absence of prejudice.[8] And while the Second Circuit, in a case decided over a decade ago, dismissed an indictment where there was no showing of prejudice, (*United States* v. *Estepa*, 471 F.2d 1132 (2d Cir. 1972)),[9] petitioners have cited no case decided since *Hasting*—and we have found none—in which the Second Circuit has

[7] Although both the majority and the dissent below indicated that the Third Circuit took a different position on the need for a showing of prejudice, the decision in this case was rendered prior to *Martino*, and both opinions cite only pre-*Martino* Third Circuit cases for the view that prejudice is not required (Pet. App. A32 n.22, A39-A40). In *United States* v. *Holloway*, 778 F.2d 653, 658-659 (11th Cir. 1985) (cited by the dissent at Pet. App. A39-A40), cert. denied, 476 U.S. 458 (1986), the court noted a conflict among the circuits; however, like the majority and the dissent below, it cited only older Third Circuit authority as holding that prejudice is not required. The Court in *Holloway* did not endorse either approach, but a recent Eleventh Circuit case has held that prejudice *is* required. See *United States* v. *O'Keefe*, 825 F.2d 314, 318 (1987).

[8] The Bank of Nova Scotia cites only one District of Columbia Circuit case, *United States* v. *McCord*, 509 F.2d 334 (1974), cert. denied, 421 U.S. 930 (1975) (87-578 Pet. 12). That case, however, was decided prior to this Court's decisions in *Mechanik*, *Hasting*, and *Morrison*. Indeed, in *Morrison*, this Court suggested that the language in *McCord* that the Bank of Nova Scotia relies upon is not good law. See 449 U.S. at 367 n.4. Moreover, the court in *McCord* recognized that while prejudice was not a strict prerequisite, it was "relevant to [its] determination" (509 F.2d at 350), and the court held that dismissal of the indictment in that case was *not* appropriate because the defendant was not prejudiced (*id.* at 350-351).

[9] See also *United States* v. *Jacobs*, 531 F.2d 87, 90 (2d Cir.) (affirming dismissal of a count of an indictment without requiring prejudice), vacated, 429 U.S. 909, on remand, 547 F.2d 772 (2d Cir. 1976) (reinstating dismissal), cert. dismissed, 436 U.S. 31 (1978).

dismissed an indictment in the absence of prejudice.[10] Thus, it is not clear whether either the Second Circuit or the District of Columbia Circuit would today dismiss an indictment for prosecutorial misconduct before the grand jury without first finding prejudice. In sum, all but two of the circuits that have considered the issue have explicitly ruled that prejudice is required before dismissal of an indictment is appropriate, and the state of the law in the other two circuits is not clear. There is therefore no present conflict among the circuits on this issue, and in light of recent decisions of this Court, it appears that the courts of appeals are moving in the direction of a uniform rule requiring a showing of prejudice as a prerequisite to dismissal. Review by this Court is therefore unwarranted.

2. Petitioners also assert (87-578 Pet. 17-22; 87-602 Pet. 17-23) that the court of appeals applied the wrong standard of review in assessing the claim of grand jury abuse. That issue likewise does not warrant review by this Court.

The court of appeals noted that the question whether the prosecutors engaged in misconduct before the grand jury "involves questions of historical fact governed by the

[10] In a recent post-*Hasting* case, *United States* v. *Hogan*, 712 F.2d 757 (1983), the Second Circuit dismissed an indictment for grand jury abuse. However, the court specifically distinguished *Hasting* in part because, unlike in *Hasting*, the misconduct was prejudicial, not harmless (see 712 F.2d at 762 n.2). In another recent case, the Second Circuit suggested in dictum that an indictment could be dismissed in the absence of prejudice, but it refused to do so under the facts presented. *United States* v. *Bari*, 750 F.2d 1169, 1176 (1984), cert. denied, 472 U.S. 1019 (1985). The court noted that dismissal of an indictment was an "extreme remedy" (*id.* at 1177). See also *United States* v. *Dyman*, 739 F.2d 762, 768 (2d Cir. 1984) (stating that dismissal of an indictment is justified to eliminate prejudice or pursuant to a court's supervisory powers, but refusing to dismiss indictment under the facts presented), cert. denied, 469 U.S 1193 (1985).

clearly erroneous standard" (Pet. App. A15). In this case, however, the court noted that the facts were essentially undisputed, and that the issue was whether those facts satisfied the legal standard governing the dismissal of indictments because of grand jury misconduct (*id.* at A16). Therefore, the court held, the question of the propriety of the dismissal in this case involves principally "the consideration of legal principles, calling for *de novo* review by the appellate court" (*ibid.*). In particular, the court explained, the question of prejudice—whether the prosecutors' misconduct tainted the grand jury proceedings—was subject to de novo review, rather than review under the clearly erroneous test (*ibid.*). Under that standard, the court of appeals determined that the district court erred in concluding that the indictment was tainted and the grand jury's function usurped by prosecutorial misconduct (*id.* at A29). The court added, however, that even if those determinations were regarded as findings of fact, the court would find them clearly erroneous on the record in this case (*ibid.*).

The court of appeals was correct in ruling that the issue of prejudice is a question of law that is subject to de novo review. Petitioners do not suggest that there is any conflict among the circuits on this issue, and in fact there is none. To the extent that the issue has been raised at all, it has been held that the issue of prejudice is a mixed question of fact and law that is subject to de novo review by the appellate court. See *United States* v. *De Rosa*, 783 F.2d 1401, 1404 (9th Cir. 1986), cert. denied, 477 U.S. 908 (1986). As the court of appeals explained in *United States* v. *Sears, Roebuck & Co.*, 719 F.2d 1386, 1392 n.9 (9th Cir. 1983), cert. denied, 465 U.S. 1079 (1984), de novo review is appropriate on this issue because "[w]e are not here engaging in a traditional factfinding function, but are making a value judgment from written grand jury transcripts whether the prosecutor's misconduct so biased the grand

jury that dismissal of the indictment is warranted." The determination whether particular conduct is prejudicial has been held to present mixed questions of fact and law, and thus to be subject to de novo review in other contexts as well. See, *e.g.*, *Strickland* v. *Washington*, 466 U.S. 668, 698 (1984) (prejudice prong of inquiry into ineffective assistance of counsel); *United States* v. *Lehman*, 792 F.2d 899, 901 (9th Cir. 1986) (inquiry into prejudice from failure to disclose exculpatory information at trial), cert. denied, No. 86-5331 (Oct. 6, 1986).[11]

In any event, as the court of appeals made clear, the outcome of this case did not turn on the standard of review. Although the court below held that it was appropriate to review de novo the district court's conclusion that the grand jury process had been tainted by the prosecutors' misconduct, the court stated that if the "clearly erroneous" test was applicable, the district court's conclusion was clearly erroneous and would therefore be reversed even under that standard (Pet. App. A29). Thus,

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[11] The cases from this Court on which petitioners rely are not enlightening on the issue presented here. Petitioners argue that the clearly erroneous test should apply, because the district court's rulings were based on live testimony. But the issue on which the court of appeals exercised de novo review—the issue of prejudice or taint—was not based on live testimony at all. Cases such as *Anderson* v. *Bessemer City*, 470 U.S. 564 (1985), and *Pullman-Standard* v. *Swint*, 456 U.S. 273 (1982), involved questions of intent or other state of mind, which constituted questions of fact. The issue of prejudice or taint, on the other hand, requires the court to assess the probable legal impact of a particular error on a body from whom neither the district court nor the appellate court has heard. That issue is therefore properly characterized as a mixed question of fact and law and is subject to de novo review. *Maine* v. *Taylor*, 477 U.S. 131 (1986), which involved the question whether scientifically accepted techniques exist for the sampling and inspection of live baitfish, is not even remotely similar to this case.

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the court of appeals examined the issues in this case under the standard of review advocated by petitioners (see *id.* at A15), and concluded that even under that standard petitioners would not be entitled to relief. Review by this Court on the issue of the standard of review would therefore serve no purpose.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General
WILLIAM S. ROSE, JR.
Assistant Attorney General
GARY R. ALLEN
ROBERT E. LINDSAY
ALAN HECHTKOPF
Attorneys

DECEMBER 1987

☆ U.S. GOVERNMENT PRINTING OFFICE: 1987—202-037/60166

No. 87-578
No. 87-602

Supreme Court, U.S.
FILED
FEB 25 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1987

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

JOINT APPENDIX

VOLUME I OF II, PAGES JA 1 TO JA 90

WILLIAM B. PENNELL
Counsel of Record
for Petitioner
The Bank of Nova Scotia

SHEARMAN & STERLING
153 East 53rd Street
New York, New York 10022
(212) 848-4000

WILLIAM A. COHAN
Counsel of Record
for Petitioners
William A. Kilpatrick,
Declan J. O'Donnell,
Sheila C. Lerner

COHAN & GREENE
1801 York Street
Denver, Colorado 80206
(303) 321-0999

CHARLES FRIED
Solicitor General
Counsel of Record
for Respondant

WILLIAM S. ROSE, JR.
Acting Assistant Attorney General

Department of Justice
Washington D.C. 20530
(202) 633-2217

PETITION FOR CERTIORARI FILED No. 87-578 OCTOBER 9, 1987
PETITION FOR CERTIORARI FILED No. 87-602 OCTOBER 13, 1987
CERTIORARI GRANTED JANUARY 11, 1988

JOINT APPENDIX
TABLE OF CONTENTS

VOLUME I OF II

	Page	Joint Appendix Page
Relevant Docket Entries, U.S. District Court		1-10
Relevant Docket Entries, U.S. Court of Appeals		11-14
Excerpts from Kane Hearing Transcripts		
Kane Hearing Transcript	38-39	15
Kane Hearing Transcript	48	15
Kane Hearing Transcript	49	15-16
Kane Hearing Transcript	50	16-17
Kane Hearing Transcript	52	17
Kane Hearing Transcript	53	17-18
Kane Hearing Transcript	54	18
Kane Hearing Transcript	57	18-19
Kane Hearing Transcript	58	19
Kane Hearing Transcript	67	19
Kane Hearing Transcript	68	19-20
Kane Hearing Transcript	69	20
Kane Hearing Transcript	70	21
Kane Hearing Transcript	74	21-22
Kane Hearing Transcript	75	22
Kane Hearing Transcript	95	22-23
Kane Hearing Transcript	96	23-24
Kane Hearing Transcript	97-98	24
Kane Hearing Transcript	99	24-25
Kane Hearing Transcript	107	25

	Page	Joint Appendix Page
Kane Hearing Transcript	108	25-26
Kane Hearing Transcript	109	26
Kane Hearing Transcript	148	26
Kane Hearing Transcript	149	27
Kane Hearing Transcript	171	27
Kane Hearing Transcript	172	27-28
Kane Hearing Transcript	175	28
Kane Hearing Transcript	241	28-29
Kane Hearing Transcript	243	29
Kane Hearing Transcript	260	29
Kane Hearing Transcript	261	29-30
Kane Hearing Transcript	262	30
Kane Hearing Transcript	263	30-31
Kane Hearing Transcript	266-267	31
Kane Hearing Transcript	279	31-32
Kane Hearing Transcript	280	32
Kane Hearing Transcript	323	32-33
Kane Hearing Transcript	324	33
Kane Hearing Transcript	364	33-34
Kane Hearing Transcript	365	34
Kane Hearing Transcript	366	34-35
Kane Hearing Transcript	367	35-36
Kane Hearing Transcript	368	36
Kane Hearing Transcript	369	36-37
Kane Hearing Transcript	370	37-38
Kane Hearing Transcript	371	38
Kane Hearing Transcript	372	38-39
Kane Hearing Transcript	373	39-40
Kane Hearing Transcript	374	40

	Page	Joint Appendix Page
Kane Hearing Transcript	375	40-41
Kane Hearing Transcript	376	41
Kane Hearing Transcript	396	41-42
Kane Hearing Transcript	397	42
Kane Hearing Transcript	398	42-43
Kane Hearing Transcript	399	43-44
Kane Hearing Transcript	400	44
Kane Hearing Transcript	409	44
Kane Hearing Transcript	410	44-45
Kane Hearing Transcript	412	45
Kane Hearing Transcript	414	45-46
Kane Hearing Transcript	415	46
Kane Hearing Transcript	416	46-47
Kane Hearing Transcript	417	47
Kane Hearing Transcript	432-433	47-48
Kane Hearing Transcript	433	48
Kane Hearing Transcript	466	48
Kane Hearing Transcript	467	48-49
Kane Hearing Transcript	468	49-50
Kane Hearing Transcript	469	50
Kane Hearing Transcript	470	50-51
Kane Hearing Transcript	471	51
Kane Hearing Transcript	476-477	52
Kane Hearing Transcript	481	52-53
Kane Hearing Transcript	482	53
Kane Hearing Transcript	483	53-54
Kane Hearing Transcript	484	54-55
Kane Hearing Transcript	485	55-56

	Page	Joint Appendix Page
Kane Hearing Transcript	486	56
Kane Hearing Transcript	487	56-57
Kane Hearing Transcript	492-493	57
Kane Hearing Transcript	494-495	58
Kane Hearing Transcript	496	58-59
Kane Hearing Transcript	500-501	59
Kane Hearing Transcript	502	59-60
Kane Hearing Transcript	503	60-61
Kane Hearing Transcript	504-505	61
Kane Hearing Transcript	515	62
Kane Hearing Transcript	523	62
Kane Hearing Transcript	541	63
Kane Hearing Transcript	542	63-64
Kane Hearing Transcript	543	64
Kane Hearing Transcript	597-598	64
Kane Hearing Transcript	599	64-65
Kane Hearing Transcript	600	65
Kane Hearing Transcript	619	65
Kane Hearing Transcript	620	65-66
Kane Hearing Transcript	632	66
Kane Hearing Transcript	633	66-67
Kane Hearing Transcript	634-635	67
Kane Hearing Transcript	636	67-68
Kane Hearing Transcript	637	68-69
Kane Hearing Transcript	638	69
Kane Hearing Transcript	639	69-70

	Page	Joint Appendix Page
Kane Hearing Transcript	691	70
Kane Hearing Transcript	692	70-71
Kane Hearing Transcript	693	71-72
Kane Hearing Transcript	694	72
Kane Hearing Transcript	695	72-73
Kane Hearing Transcript	696	73
Kane Hearing Transcript	697	73-74
Kane Hearing Transcript	698	74
Kane Hearing Transcript	699	74-75
Kane Hearing Transcript	700	75-76
Kane Hearing Transcript	701	76
Kane Hearing Transcript	702	76-77
Kane Hearing Transcript	703	77-78
Kane Hearing Transcript	704	78
Kane Hearing Transcript	705	79
Kane Hearing Transcript	706	79-80
Kane Hearing Transcript	707	80-81
Kane Hearing Transcript	708	81
Kane Hearing Transcript	709	81-82
Kane Hearing Transcript	710	82-83
Kane Hearing Transcript	711	83
Kane Hearing Transcript	712	83-84
Kane Hearing Transcript	739	84
Kane Hearing Transcript	740	84-85
Kane Hearing Transcript	741	85-86
Kane Hearing Transcript	742	86
Kane Hearing Transcript	743	86-87
Kane Hearing Transcript	802	87

	Page	Joint Appendix Page
Kane Hearing Transcript	1067	87-88
Kane Hearing Transcript	1068	88
Kane Hearing Transcript	1122	89
Kane Hearing Transcript	1137	89
Kane Hearing Transcript	1175	89-90

JOINT APPENDIX VOLUME II OF II (Filed Under Seal)

Excerpts from Grand Jury Transcripts

Name	Date	Time	Transcript Page	Joint Appendix Page
Mendrop	1/16/81	1: 31 p.m.	2	91
Raybin	1/16/81	1: 33 p.m.	2	91
			38-39	91
Snyder	2/21/81	9:40 p.m.	2	92
			3	92–93
			6	93
			7	93-94
			11	94
Snyder	3/4/81	11: 10 a.m.	4	94-95
Snyder	7/8/81	8: 39 a.m.	8	95
			9	95-96
			10	96-97
			11	97
			13	97-98
			15-16	98
			18	98
			20-21	99
			23	99-100

Name	Date	Time	Transcript Page	Joint Appendix Page
Raybin	7/8/81	9: 11 a.m.	2	100
			3	100-101
			4	101
			24	101
			25	101-102
			26	102
			27	102-103
			28	103-104
			29	104
			30	104-105
			31	105-106
			32	106
			33	106-107
			34	107-108
			35	108
Snyder	7/8/81	10: 50 a.m.	4	108
			5	108-109
			6	109
			8	109
Snyder	7/8/81	12: 05 a.m.	5	110
Mendrop	7/8/81	12:14 p.m.	2	110
Mendrop	8/4/81	9: 25 a.m.	2	111
			3	111-112
			4	112
Snyder	8/5/81	3: 30 p.m.	5	113
Snyder	8/5/81	4: 11 p.m.	3-4	113
Mendrop	9/9/81	8: 44 a.m.	2	113
Snyder	9/9/81	10: 00 a.m.	2	113-114
Raybin	9/9/81	10 :02 a.m.	2-4	114
			5	115

Name	Date	Time	Transcript Page	Joint Appendix Page
Snyder	9/9/81	10: 15 a.m.	2	115
Snyder	10/6/81	10: 58 a.m.	2	115-116
			3	116
			12	116-117
Gatliff	11/3/81	10: 30 a.m.	29	117
			30	117-118
			31	118-119
			32	119
Mendrop	11/3/81	2: 23 p.m.	2	119
Raybin	11/3/81	3:32 p.m.	2	119-120
Mendrop	11/4/81	10: 15 a.m.	2	120-121
			3	121
Mendrop	11/4/81	10: 34 a.m.	2	121-122
Blondin	1/5/82	9:09 a.m.	2	122
			3	122-123
			4	123-124
			5	124
			6	124-125
			7	125
			8-9	126
			10	126-127
			11	127-128
			12	128-129
			13	129
			14	129-130
			15	130
			22	130-131
			23	131
			24	131-132
			25	132

Name	Date	Time	Transcript Page	Joint Appendix Page
Hoff	1/5/82	9: 59 a.m.	2	132-133
			3	133-134
			4	134
Major	1/5/82	11: 13 a.m.	2	134-135
			3	135
			4	135-136
			5	136
Blondin	1/7/82	2: 56 p.m.	2	136-137
Blondin and Snyder	2/1/82	10:40 a.m.	4	137-138
			5	138
			8	138
			10	138
Raybin and Mendrop	2/1/82	11: 13 a.m.	2	139
McManus	2/2/82	1: 07 p.m.	3	139-140
			4	140
Plocus	2/2/82	1: 14 p.m.	2	140-141
			3	141-142
			4	142
Warren	2/2/82	1: 20 p.m.	3-4	143
Snyder	2/2/82	1: 07 p.m.	5	144
			6	144-145
			7	145-146
			8	146
			9	146-147
			10	147-148
			11	148
			12	148-149
			18	149
Raybin and Mendrop	2/2/82	1: 47 p.m.	2	149

Name	Date	Time	Transcript Page	Joint Appendix Page
D'Amico	2/4/82	12: 35 p.m.	5	149
			6	149-150
			7	150
			8	150-151
Raybin and Mendrop; Snyder	2/4/82	3: 30 p m.	2	151-152
			3	152
			4	152-153
Snyder	3/2/82	9: 13 a.m.	2	153
Drizin	3/2/82	9: 29 a.m.	2	153
			3	153-154
			4	154
Jacobson	3/2/82	9: 34 a.m.	3	154
			4	154-155
Snyder	3/2/82	10: 04 a.m.	2	155
Snyder	3/2/82	2: 56 p.m.	4	155
			5	156
			6	156-157
			7	157-158
Counter	3/2/82	4: 04 p.m.	3-4	158
Blondin	4/6/82	9: 08 a.m.	4	158-159
			8	159
Burke, Mendrop, and Shea	4/6/82	1: 30 p.m.	2	160
Burke, and Shea	4/7/82	11: 21 a.m.	2	160
Blondin, Burke, and Shea	4/7/82	11: 48 a.m.	2	160-161
			3	161
Burke, and Shea	4/7/82	1: 29 p.m.	2	161-162

Name	Date	Time	Transcript Page	Joint Appendix Page
Snyder	5/3/82	9: 15 a.m.	5-7	162
			15	163
			16	163-164
			17	164
			21	164
			22	165
			23	165-166
Mendrop	5/3/82	1: 11 p.m.	2	166
Snyder	5/3/82	1: 39 p.m.	2	166-167
			3	167-168
			4	168-169
			5	169
			13	169
Snyder	7/19/82	9: 08 a.m.	5	169-170
			6	170-171
			7	171
			9	171
O' Donnell	7/19/82	1: 14 p.m.	122-123	171
Snyder	7/19/82	2: 45 p.m.	2	172
			3	172-173
			4	173
Bell	7/20/82	9: 12 a.m.	2	173
			3	173-174
			8	174
			9	174-175
			10	175
Snyder	9/29/82	8: 52 a.m.	2	175
			3	175-176
			5	176
			7	176
			8	176-177
			9	177
			10	177-178

Name	Date	Time	Transcript Page	Joint Appendix Page
			12	178
			13	178-179
			14	179
			15	179-180
			16	180–181
			18	181
Mendrop	9/29/82	9: 32 a.m.	2-3	181
			22	181-182
			23	182
			24	182-183
			25-26	183
			49	183-184
			50	184
			51	184-185
			52	185
			54	185-186
			55	186
			56	186-187
			57	187
			62	187-188
			64	188
			65	188-189
			66	189
			67	189-190
			68	190
			72	190
Blondin and Snyder	9/30/82	9: 07 a.m.	3	190-191
			4	191-192
			5	192
			10	192
			11	192-193
			12	193-194

Citations To Appendices To Petitions For Certiorari

	Bank of Nova Scotia Petition	Kilpatrick et. al. Petition
Opinion of the United States Court of Appeals for the Tenth Circuit (821 F.2d 1456) dated June 18, 1987	A1-A41	4a–48a
Order of the United States Court of Appeals for the Tenth Circuit Denying Rehearing dated August 19, 1987	B1-B3	la-3a
Opinion of the United States District Court for the District of Colorado (594 F. Supp. 1324) dated September 24, 1984 *("Kilpatrick II")*	C1-C55	49a–108a
Opinion of the United States District Court for the District of Colorado (575 F. Supp. 325) dated August 25, 1983 *("Kilpatrick I")*	D1-D35	121a–156a
Opinion of the United States Court of Appeals for the Tenth Circuit *Blondin v. Winner,* (822 F. 2d 969) dated July 20, 1987		109a–120a
Rule 28.1 Listing of Parents, Subsidiaries and Affiliates of The Bank of Nova Scotia	E1	
Constitutional Provision and Federal Rules of Criminal Procedure	F1-F3	
18 U. S. C §§ 6002, 6003		157a-159a

Relevant Docket Entries, U.S. District Court

• • • • •

9/30/82 Indictment

11/10/82 Def't.'s Demand for a Speedy Trial . . . com
MOTION of Def't. to Dismiss Ct. XXVII of the Indictment . . . com
Memorandum of Law in Support of Def't.'s Motion to Dismiss Ct. XXVII of the Indictment . . . com

• • • • •

11/26/82 MOTION of Def't. for Bill of Particulars . . . com
MOTION of Def't. to Dismiss for Failure to State an Offense . . . com
MOTION of Def't. to Dismiss for Prosecutorial Misconduct . . . com
MOTION of Def't. to Review Transcripts of GJ Proceedings . . . com
MOTION of Def't. Authorizing Interview of Grand Jurors . . . com
Memorandum Brief in Support of Def't.'s Motion to Dismiss for Prosecutorial Misconduct . . . com

• • • • •

2/4/83 Govts. Response to Motion of Def't. To Dismiss . . . Failure to State Offense.
Govts. Response to Def'ts., MOtions for Order authorizing interview of Grand Jurors; for Disclosure of Grand Jury Transcripts, and To Dismiss for Pros. Misconduct.

• • • • •

2/21/83 Hearing-(JLK) Pending Motions Ordered: Motion to Dismiss Counts I and II are GRANTED. Counsel are to determine how they wish to proceed on remaining counts by end of day Wednesday 2-23-83. Or-

dered: Motion to Dismiss Nova Scotia is GRANTED.

• • • • •

2/23/83 Minute Order . . . (JLK) The Government's Motion for a Written Order regarding Judge Kane's Oral Orders of 2/21/83 is DENIED.
Signed . . . (JLK) Order . . ORDERED: Counts III through XXVI are dismissed as well as Counts I and II of the Indictment and the hearing set for Saturday, 2/26/83 is vacated and, within ten days the def't. may renew previously filed motions or file additional motions as related to the remaining Count XXVII The trial on Count XXVII will be set without delay.

• • • • •

3/17/83 NOTICE OF APPEAL filed by pltf from Order of 2/23/83 . . . designation conf set 3/24/83 at 4:15 pm in C-161 . . . trans order due 3/28/83 . . . letter sent to all counsel of record 3/18/83 . . . no fees required

5/2/83 TRIAL TO JURY (FMW) 1st Day. . . Jurors sworn (Def't Dilpatrick on Count 27.)

5/3/83 TRIAL TO JURY (FMW) 2nd Day (Def't Kilpatrick on Count 27.)

5/4/83 TRIAL TO JURY (FMW) 3rd Day (Def't Kilpatrick on Count 27.)

5/5/83 TRIAL TO JURY (FMW) 4th Day (Def't Kilpatrick on Count 27.)

5/6/83 TRIAL TO JURY (FMW) Fifth Day (Def't Kilpatrick on Count 27.)

5/9/83 TRIAL TO JURY (FMW) Sixth Day (Def't Kilpatrick on Count 27.). . . Jury returns to continue de-

liberations . . . ORDERED: Def't. to have 30 days to file post-trial motions and briefs. . . The Government to have 10 Days thereafter to file a response. . . The matter will then be set for hearing. . . ORDERED: Bond Continued. . . Jury returns with a Verdict finding the defendant GUILTY as charged in Count 27.

• • • • •

6/20/83 MOTION of Defendant for Government Misconduct
Brief In Support of Motion to Dismiss for Government Misconduct
Affidavit of William C. Waller, Jr.
Affidavit of Richard K. Rufner
Affidavit of Mildred D. Reeves
Affidavit of Declan J. O"Donnell
Affidavit of Donald A. Moorison

• • • • •

6/20/83 MOTION of Defendant for Judgment of Acquittal or in the Alternative for an Order Granting a New Trial.

• • • • •

6/24/83 Notice of Hearing . . . (FMW) You are advised that a hearing on all post trial motions has been set at 9:00 a.m. on July 12, 1983 in C-502.

• • • • •

7/11/83 Signed . . . (FMW) Ordered that the government may file written responses on or before August 1, 1983 but the evidentiary hearing will commence as scheduled on July 12, 1983. Counsel has been advised by letter that it is unlikely that the evidentiary hearing can be concluded this week, and if more testimony is needed later, another date will be set.

7/11/83 Government's Responses to Defendant's Motions (1) To Dismiss for Government Misconduct, (2) For Judgment of Acquittal or in the Alternative for an Order Granting a New Trial, and, (3) For Authorization to Take Deposition of Wilson Quintela at Government Expense

• • • • •

7/12/83 HEARING (FMW) Defendant's Post Trial Motions

• • • • •

7/13/83 HEARING (FMW) Post Trial Motions (2nd Day) Mr. Anderson of Justice dept replaces Mr. Snyder, Blonding and Scharf . . . Witnesses . . . Exhibits . . . Court in recess to 7/14/83.

7/13/83 NOTICE OF HEARING (FMW) Post Trial Motions to be heard 8/16/83 at 1:30.

7/14/83 Signed (FMW) Order . . . Grand Jury Transcripts to be reviewed by Judge Winner.

• • • • •

7/14/83 HEARING (FMW) Post Trial Motion (3rd Day) . . . Witnesses . . . Exhibits . . . Court in recess to 10:00 a.m. tomorrow.

7/15/83 HEARING (FMW) Post Trial Motion (4th Day) . . . Witnesses . . . Exhibits . . . Ordered: Hearing cont. to 8/16/83.

8/1/83 MOTION of Govt. to Seal Govts. Brief in Response to Court's order of 7/15/83.
MOTION of Govt. for Order Authorizign Disclosure fo Grand Jury Material.
Def'ts. Opening Brief Re: Prosecutorial Misconduct.

• • • • •

8/9/83 MANDATE of C/A . . . partial remand for this Court to hold further hearings and for findings and conclusions which may be related to this appeal . . . Ordered: on conclusion of such further proceedings this Court is to transmit a supplemental record of the additional findings, conclusions and orders made with respect to the allegations of prosectorial misconduct . . . the C/A will consider the consolidation of any further appeals from any orders following such hearings by this Court . . . except for the partial remand the C/A retains juris. for final disposition of the merits following this partial remand Record rec'd from C/A . . . VOLS I-VI and SUPP VOL. I-II

8/9/83 NOTICE OF HEARING (FMW) . . . in accordance w/mandate of 10th Circuit further hearing is set 8/16/83 at 9:00 a.m. in C-200 . . . com

• • • • •

8/16/83 HEARING POST TRIAL MOTIONS (FMW) . . . Ordered: every def't will be deemed joined in def't. Kilpatrick's Mtn to Dismiss the Indictment w/ leave to file a formal motion to that effect . . .

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8/17/83 HEARING POST TRIAL MOTIONS (FMW) 2nd day . . .

• • • • •

8/31/83 MOTION by Kilpatrick Pursuant to Rule 6 (e) (3) (c) (ii)

• • • • •

9/6/83 Motion by Gov't to Withdraw Memo. Opinion of 8/25/83 or in Alternative to Amend Such Opinion to

Delete all References to Names of Prosecutors and all Information that Identifies THem
Memo in Support of Motion to Withdraw Opinion of 8/25/83
Motion by Gov't for Reconsideration of the Court's Order of 8/25/83 for an Order Denying Def't. Kilpatrick's Motion for New Trial Brief in Support of MOtion for Reconsideration . . . New Trial

9/7/83 Sgd (FMW) ORDER . . . DENYING gov't Motions to Withdraw memorandum opinion of 8/25/83 and Motion for reconsideration of the Order of 8/25/83 and for an Order denying def't. kilpatrick's motion for new trial . . . com

9/9/83 GOV'T RESPONSE to Def't. Kilpatrick's Motion for Disclosure of Grand Jury Transcripts

9/14/83 STATUS CONF (JLK) . . . statements of counsel . . . Ordered: Ct. to receive all transcripts on G.J. proceedings and before FMW . . . Counsel to advise what trans. may be used by the Ct . . . on or before 10/3/83 counsel to inform Ct. what prior testimony can be offered . . . on or before 10/3/83 counsel to inform Ct. what witnesses to be called and approx. time for direct testimony . . . on or before 10/3/83 counsel to submit exhibits and list . . . w/i 10 days counsel to submit stipulation on any matters that may be shorten hrg

• • • • •

9/16/83 NOTICE OF APPEAL filed by the Gov't from Order of Court 9/7/83 . . . designation conf set 9/29/83 at 2:00 pm . . . transcrpt order form due 9/29/83 . . . GOV'T APPEAL—NO FEES REQUIRED . . . letter sent to counsel of record and def't 9/19/83
NOTICE OF APPEAL filed by the Gov't from Order of Court Denying Gov't Motion to W/D Memo. &

Opinion of 8/25/83 . . . designation conf set 9/29/83 at 2:00 pm . . . transcript order form due 9/29/83 . . . GOV'T APPEAL—NO FEES REQUIRED . . . letter sent to counsel for record and def't 9/19/83

• • • • •

10/12/83 NOTICES OF APPEAL DOCKETED BY CIRCUIT COURT . . . CASE NOS. 83-2284 and 83-2285 ASSIGNED

• • • • •

10/25/83 Transmittal to Tenth Circuit of SUPP VOLS I-VI . . . trial transcripts . . . for Record on Appeal in 83-2284
MANDATE OF C/A in 83-2285 . . . on Motion of Appellant the appeal is DISMISSED . . . com . . in re: "new trial motion for reconsideration"
Receipt from C/A for SUPP. VOLS I-VI in 83-2284

• • • • •

11/10/83 Minute Order (JLK) . . . at hrg 11/17/83 on def'ts' motion to dismiss the indictment def'ts as movants will present evidence first . . . all parties are to notify the Court prior exactly what portions of transcripts of previous hearings will be introduced in lieu of live testimony . . . a list of live witnesses and time required for direct exam are to be submitted . . . def'ts and pltf are to advise the Court of any testimony by telephonic conference is anticipated . . . all such information shall be provided to the Court not later than 11/15/83 . . . com

• • • • •

11/17/83 PENDING MOTIONS (TRIAL TO COURT) . . (JLK) . . . Ordered: Court Reporter to inform

the U.S. Atty and the Court by 11/23/83 when all transcripts will be prepared . . . def'ts' witness . . . recess

11/18/83 PENDING MOTIONS CONT'D (JLK) . . . witness . . . exhibits . . . recess

11/22/83 PENDING MOTIONS CONT'D (JLK) . . . def't's witness . . . exhibits . . . recess

11/23/83 PENDING MOTIONS CONT'D (JLK) . . . def't's will file documents from bankruptcy Court for judicial notice . . . Def't's rest . . . three day estimate for Plaintiff's case . . . recess

12/7/83 NOTICE OF HEARING (JLK) hearing on pending motions to resume on 12/13, 14 & 15, 1983 at 9:00 am . . . com

• • • • •

12/13/83 CONT'D HEARING ON MOTIONS (JLK) . . (Trial to Court) . . . pltf's witnesses . . . exhibits . . . recess

12/14/83 CONT'D HEARING ON MOTIONS (JLK) . . (Trial to Court) . . . pltf's witnesses . . . exhibits . . . recess

• • • • •

12/15/83 CONT'D HEARING ON MOTIONS (JLK) . . (Trial to Court) . . . pltf's witnesses . . . exhibits . . . recess.

• • • • •

1/4/84 ORDER FROM C/A . . . on emergency motion of gov't that West Pub. Co. be directed not to publish D.C. memo. opinion of 8/25/83 in perm. bound volume of F. Supp. identified as 570 F. Supp. 505 it is

ORDERED: West Pub. Co. ordered to dely temporarily publication of said opinion and **FURTHER**: def'ts/appellees to file response to said emergency motion on/before 1/13/84 showing cause why said temporary stay should not be made permanent

• • • • •

2/6/84 CONT'D HEARING ON MOTIONS (JLK) . . . statements by govt counsel re: letters of Assurance . . . witnesses and exhibits . . . recess

2/7/84 CONT'D HEARING ON MOTIONS (JLK) . . . witnesses and exhibits . . . certain exhibits offerred/received conditionally on further showing that allegations can be met . . . govt may move for reconsideration . . . recess

2/8/84 CONT'D HEARING ON MOTIONS (JLK) . . . ORDER: on motion of def't counsel Robert Anello admitted *pro hoc vice* for this hearing . . . witness and exhibit . . . oral statement/motion by def't counsel that certain testimony be stricken DENIED. . . ORDER: Def'ts' have 40 days to file their post Findings of Fact & Conclusions . . . govt has 20 days after receipt to file Response . . . def'ts' have 10 days after receipt of response to reply . . . hearing recessed

9/24/84 Sgd (JLK) FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER . . . after findings and conclusions it is ORDERED: the indictment is dismissed because of totality of circumstances which include numberous violations of Rule 6(d) and (e) FRCrP, violations of 18:6002 and 6003, violations of the 5th and 6th Amendments to the US Constitution knowing presentation of misinformation to the grand jury and mistreatment of witnesses . . . com . . . eod 9/25/84

Relevant Docket Entries, U.S. District Court

• • • • •

10/24/84 NOTICE OF APPEAL filed by Govt. from Order of this Court on Sept. 24, 1984 . . . designation conf set at 8:30 am on 10/31/85 . . . transcript order form due 11/3/84 . . . GOVT APPEAL REQUIRES NO FEES . . . letter sent to all counsel and def'ts 10/25/84

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10/27/87 Notice from the Court of Appeals that a petit. for writ of certiorari was filed in the Supreme Court and assigned case #87-602

1/25/88 Letter from the C/A advising that the petition for writ of certiorari filed in this case was GRANTED by an order of the Supreme Court dated 1/11/88

Relevant Docket Entries, U.S. Court Of Appeals

3/21/83 CS.DKT. Case docketed

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7/27/83 M.RMD., CS.SUBM Appellee's motion to remand case submitted to panel

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8/8/83 M.RMD.CS.DISP Granted appellee's motion to remand case partially Holloway, Seymour, Bohanon (parties served by mail) Order case partially remanded to d.c. for further hearings on conclusion of which the d.c. is ordered to file supplemental record of findings, conclusions and orders re prosecutorial misconduct—Holloway, Seymour, Bohanon (parties, d.c. served by mail.)

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12/29/83 M.F.ANY.F. Appellant's emergency motion for order to postpone publication of District Court's opinion filed, orig., cs (83-2284).

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1/3/84 M.F.ANY.DISP. Granted appellant's emergency motion in 83-2284 for order to postpone publication of district court's opinion disposed of by Holloway, Seymour, Bohanon (parties served by mail)

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4/10/85 O.CS.CON Order cases 83-1363 through 83-1369, 83-2284, 84-1231, 84-2481 through 84-2487 consolidate for all further appellate proceedings disposed of by Holloway. Parties served by mail.

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7/23/85 M. SUP.ROA.F/SUBM.Appellant's (government) motion to supplement record with supporting memo filed & submitted to panel.

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6/18/87 OPN.F Published, signed opinion filed—Holloway, Seymour, Bohanon Writing Judge is Holloway. (parties served by mail)
DIS.OPN.F Published, dissenting opinion filed by Seymour. (parties served by mail)
JM.DISP Judgment is reversed. The cause is remanded to the district court for further proceedings in accordance with the opinion of the court.

7/20/87 OPN.F Published, signed opinion filed—Holloway, Seymour, Bohanon Writing Judge is Seymour. (No. 83-2284). (Parties served by mail)
JM.DISP Judgment is appeal dismissed. (No. 83-2284)
MDT.ISS Mandate issued to district court. (No. 83-2284).
OPN.F Published, signed opinion filed (combined with above opinion). (No. 84-1231)
JM.DISP Petition for writ of mandamus is denied.
ISS.CC.O Issued certified copy of judgment to district court. (No. 84-1231)
CASE CLOSED.

7/27/87 MDT.RCPT.F Mandate receipt filed in 83-2284.

8/3/87 P.REHRG.ENB.F Appellant's petition for rehearing enbanc filed, + 12cc, C/S.

8/4/87 P.REHRG.ENB.SUBM Appellant (Lerner) petition for rehearing submitted to panel.

8/3/87 P.REHRG.ENB.F Appellee's (O'Donnell) petition for rehearing filed, orig + 11cc, C/S.

8/4/87 P.REHRG.ENB.SUBM Appellee's (O'Donnell) petition for rehearsing filed 8/3/87, submitted to panel.

8/3/87 P.REHRG. ENB.F Appellee's (Bank of Nova Scotia, Kilpatrick and Alberga and Gill) petition for rehearing en banc filed, Orig + 12cc, C/S.

8/4/87 P.REHRG. ENB.SUBM Appellee's (Bank of Nova Scotia, Kilpatrick and Alberga and Gill) petition for rehearing en banc filed 8/3/87 submitted to panel.

8/19/87 P.REHRG.ENB.DISP Appellee's (Kilpatrick, O'Donnell, Lerner, Bank of Nova Scotia, Alberga and C.S. Gill) petition for rehearing en banc filed, 8/3/87,— Denied Holloway, Logan, Seymour, Anderson, Tacha, Baldock. (parties served by mail). Case Nos. 83-1363 - 83-1368; 84-2481 - 84-2486.

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9/3/87 M.STAY.ISS.MDT.DISP Appellees' motion to stay issuance of mandate pending certiorari, granted—Holloway, Seymour, Bohanon. (parties served by mail) Mandate stayed through 10/3/87. THE COURT WILL NOT FAVOR FURTHER MOTIONS TO STAY ISSUANCE OF THE MANDATES.

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10/19/87 P.WRIT.CERT.F Appellee (Bank of Nova Scotia) petition for writ of certiorari filed 10/9/87, has been assigned Supreme Court #

10/22/87 P.WRIT.CERT.F Appellee (Kilpatrick) petition for writ of certiorari filed 10/9/87 has been assigned Supreme Court # 87-603.

11/02/87 P.WRIT.CERT.F Blondin (84-1231) petition for writ of certiorari filed 10/19/87. Supreme court no. is 87-646.

Relevant Docket Entries, U.S. Court Of Appeals

1/15/88 P.WRIT.CERT.DISP Appellee (Bank of Nova Scotia) and (Kilpatrick) Nos. 83-1363-69 & 84-2481-87 petition for writ of certiorari filed 10/19/87 has been granted.

1/19/88 P.WRIT.CERT.DISP Petition for writ of certiorari filed in No. 84-12 (mandamus) denied by Supreme Court on 1/11/88.

Excerpts from Kane Hearing Transcripts

DIRECT EXAMINATION
BY MR. NESLAND

(38) *** Q. Why was Jerry Shea listed? **[IRS Agent Paul Raybin]** A. Jerry Shea is a special agent with the Criminal Investigation Division and was assisting us in doing analyses (39) of bank records and he also assisted in doing the computer indexing of all the documents in the case.

Q. Keypunching? A. It wasn't keypunching. The information was handwritten down on flow chart paper, just computer paper, and that information was later keypunched.

Q. Who did the keypunching? A. Keypunching was done some by computer keypuncher in Ogden, Utah, where the I.R.S. has its computer group, and some by computer technicians in Dallas, Texas.

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(48) *** Q. So as I understand it, what happened was that you knew that the civil examination division had pulled together a substantial number of the tax returns of investors in the UFO program; is that correct? A. That's correct.

Q. And you made a request for them to turn those tax returns over to the grand jury or to the I.R.S. C.I.D. or who? A. The request was made from I.R.S. C.I.D. in Denver for the returns to be sent to I.R.S. C.I.D. Denver. Those returns as of the time I left were being maintained by I.R.S. C.I.D. Denver.

Q. All right. A It was not a grand jury request.

Q. All right, so they were not placed in the grand jury room, they were simply, at least the last you knew, they were in the C.I.D. offices here in Denver? A. That's correct.

(49) Q. But as I understand your testimony, from those tax returns you made a selection of investors to interview? A. I don't know whether that's a fair statement. I don't recall whether the

selection was made as a result of —we had less through the grand jury investigation of all the investors and the places where they were and the amount of deductions they contained. I would think a more fair statement would be that we reviewed the deductions taken by different individuals and chose a select group of people in three different cities for those interviews; of course, four cities if you include Denver.

Q. All right, and who made that selection, you and Agent Mendrop? And who did the mechanical selection part of going through the list? A. I believe the mechanical selection was done by Mr. Mendrop and I.

Q. And you chose four cities? In other words, you just look— A. Yes.

Q.—look at the list and if somebody fell in a particular city, you may or may not be selected for interviewing? A. Seems to me there were five cities. The reason people were chosen or the cities were chosen was primarily a result of large groups of investors from a wide variety of programs living in that one area so it was more cost effective to send two agents to that city so they could do a number of different (50) interviews and cover a number of different programs all in one trip.

Q. Okay. Can you give me the name of the five cities? A. Houston; I believe Phoenix, Arizona; Los Angeles; Las Vegas; and Denver is the other city where the investors were interviewed.

Q. Do you have any idea how many investors were learned through the grand jury independent of those that you testified were learned through the civil examination division? A. I think the only ones would have been investors in the 1980 methanol program.

Q. Would there be a mix there, some of them would have been learned only through the grand jury and some of them would have been learned through the civil examination division audit? A. I believe all the names of the 1980 investors would have been learned though the grand jury investigation for the purposes of

my knowledge. I don't know what the examination division got on its—

Q. I'm just asking for your knowledge. A. I don't know what the examination division did. I know that's how we, as a result of — that's how the government in the criminal investigation became aware of the 1980 investors.

* * * * * *

(52) *** Q. Did you make the selection of the individuals and then request the tax returns of only those selected individuals or did you just simply request all the tax returns for all of the investors that you were aware of? A. I believe in general we—all the tax returns that the civil examination division had under its control in its civil audit, in its control of investors in the coal program and the (53) methanol program, we made specific request for the examination division to provide us with all of those returns.

Q. And you earmarked the group that you knew had those tax returns under their control so that you wouldn't have to apply to every district; you knew that they were in a particular area and had been obtained by a particular group that was doing this particular audit before the grand jury started? A. Yes, I was not actively involved in the requesting of returns. Mr. Bandy was overseeing that and that was being handled—Miss West participated in that significantly, as did Miss Patterson. My best recollection is that initially the Criminal Investigation Division received from the examination division a list of all returns of coal and methanol tax shelter investors that it had under control.

Q. And this occurred sometime around this March 28, 1982 area? A. No, it would have been initiated long before that time, possibly maybe as early as January, maybe even as early as before that.

Q. Before the grand jury commenced? A. No, no, after the grand jury.

Q. After the grand jury commenced? A. This is a year and three months after the grand jury.

Q. You're saying January of '82 it could have occurred? A. Yes.

Q. As early as January of '82? (54) A. That's correct.

Q. Do you have a recollection as to whether or not requests were made for the 1980 investor tax returns? A. I just have no specific recollection on that point.

Q. You were involved, were you not, in selecting the investors for interviewing and then going out and conducting interviews? A. Yes, but the two are separate. The selection of people to be interviewed, it's my best recollection, was a separate function from the gathering of returns.

Q. Were you involved in both—you were involved in the selection function? A. Yes, and I was involved to the extent of letting Mr. Bandy know that it was necessary that all returns that were under control be obtained for potential trial use.

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(57) *** Q. And then on October 20, 1982, there is a notice of disclosure which I believe is the first one or the second one in that group that you have marked there as Defendant's Exhibit Q. A. That's correct.

Q. Now, this notice of disclosure occurs approximately one month after the grand jury had returned the indictment in this case; is that correct? A. Yes, that's correct.

Q. Was there a further grand jury hearing other evidence? A. No.

Q. So that the form of this particular notice of disclosure is incorrect in that it says the purpose of providing these persons' names is to assist in the presentation of criminal matters to a grand jury. I assume that's just incorrect? A. I don't think that's incorrect. I think it reflects an after-the-fact filing.

Q. What do you mean by "after-the-fact"? A. That these people would have been involved in assisting with matters prior to this date and as such this is an after-the-fact filing.

Q. Is it fair to say that most of those we've gone through is after the fact; that the people have worked or have been talked (58) to or had discussions or had been consulted and then after the fact you file a notice that disclosure was made to them? Is that how it was done? A. Normally not. There would have been, for the most part—on all those previously named people, there would have been a filing. There would have been a request to the U. S. Attorney's Office for inclusion in this record at or about the time that people were to be involved.

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(67) *** Q. (BY MR. NESLAND) And this particular disclosure list was prepared as a result of your conversation with Mr. Snyder sometime around the end of September when the indictment was returned? A. That timing is my best recollection when it occurred, yes.

Q. And the purpose of it was for you to determine what personnel in I.R.S. had received grand jury information that hadn't been listed yet? A. Primarily, the function was for us to go back through the list, see if we had missed or forgot to put any individuals on (68) the disclosure list, and to make sure that that disclosure was made of individuals who principally had access to grand jury information.

Q. And that was for you, either you or Agent Mendrop, to do that? A. It was our—yes, it was our responsibility to go through the list and make that determination.

Q. So do I understand that what you did was take all of the other disclosure lists we have here and go through them and determine who was on them? A. Who was not on them.

Q. How did you determine who was not on there, who should be on there that wasn't on there? A. By looking to see

who was on and calling people who had some role or some function during the course of the investigation but for one reason or another had not been put on the disclosure list.

Q. So you and Mr. Mendrop just split up the names and either talked to the agent or gave him a telephone call and asked him who, if anybody, worked for him that should have been disclosed and get a master list and figure out who wasn't on it? A. Mr. Mendrop and I went through a stack of documents similar to this and, as a result of going through that, remembered other individuals who had either participated in the investigation directly or had been exposed to the grand jury (69) information as a result of our consultations and that list contains those individuals.

Q. But did you do that—as I understood it, you did that by talking to some of the other agents and calling agents or—A. That's not correct.

Q. All right, so you didn't do that? A. We did this by Mr. Mendrop and I sitting down and looking at this list, and as a result of looking at this list, remembering other individuals who had either assisted in the grand jury investigation directly or who had been involved in the advisory discussion role that we'd mentioned but whom Mr. Mendrop and I had not seen put on the list.

Q. All right. So this list is basically a list of those who you and Mr. Mendrop recall having been involved in some way in the investigation but hadn't been on the previous disclosure lists? A. That's correct.

Q. That's what this represents and even now you don't remember some of them that are on there? A. And that would be—either me not knowing or Mr. Mendrop having had that knowledge that I didn't have.

Q. But what this represents is your recollection of every person who you could recall worked on this investigation and hadn't appeared on any of these lists; that's what this document is, isn't it?

(70) MR. ALEXANDER: I just object to the point that I think we have been repeating on this list and I assume we have covered it.

THE COURT: Well, answer this question and go on to the next one.

THE WITNESS: Could you repeat the question?

Q. (BY MR. NESLAND) I just want to make sure that what this October 20th, 1982 notice of disclosure list is is simply yours and Mr. Mendrop's recollection of persons you could recall as of this time had worked on this investigation or had access to grand jury material that you did not find listed of the previous lists; that's what this document is? A. Yes.

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(74) *** Q. And then those indexes—what happened to the index of the documents, the 10,500 documents? What was done with that index? A. The index in its raw form is merely words on sheets of paper. I think you can put 10 to 20 documents indexed on a given page and within different columns. Those raw pages were then handcarried to Ogden, Utah, I believe, to be keypunched. I believe in some instances they were taken to Dallas to be keypunched and the keypunch cards were handcarried back to Denver.

Q. All right, so they were taken to Ogden, Utah to what, the I.R.S. offices in Ogden? A. To the Ogden Service Center, which has a large computer function capability.

Q. So that those lists were taken to Ogden and then keypunched into the computer in Ogden, Utah? A. No, they were just taken to Ogden, Utah and the raw data was turned into keypunch cards.

Q. All right, who did that? A. A group of people in the computer group, keypunchers, and that was done under the control of a supervisor out there. I don't recall his name.

Q. Was he on the list? (75) A. I don't know whether he's on the list or not. I don't recall seeing his name but I don't recall his name either. Mr. Mendrop would.

Q. What division was he in? A. I don't specifically recall whether he was actually with Criminal Investigation Division in Ogden or whether he was with the manager of the computer section in Ogden.

Q. Do you know how many persons were involved in keypunching? A. No.

Q. And I assume none of their names appear on this list, so far as you know? A. I don't know if their names do appear on this list. I know that the person who is in charge of supervising keypunching, whoever that man was out there, and I don't recall his name, he was advised by Mr. Mendrop in one telephone conversation that I recall to maintain a list of the names of all people who did the keypunching.

Q. But you don't recognize any of those persons as having been on this list— A. I don't think—

Q. —in Defendant's Exhibit Q? A. I don't recall anybody specifically named was from Ogden.

Q. Pardon? A. I don't recall seeing anybody named here that was, whose name was or place of work was Ogden.

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DIRECT EXAMINATION
BY MR. NESLAND

(95) *** Q. Did you inform any of the investors that if they did not interview that they would be subpoenaed to the grand jury? **[IRS Agent Richard Mendrop]** A. Well, I don't remember actually ever doing that. I'm not saying that it wasn't done, but I can't recall an instance where we said that.

Q. Why do you hesitate on that? A. Because it's entirely possible that we may have informed them that if they did not, that they could be subpoenaed. If they either didn't talk to us or chose not to talk to us, it was possible that they could be subpoenaed before the grand jury. Whether we actually said that to someone, I don't recall.

Q. Had you discussed with Mr. Snyder or Mr. Blondin whether or not if an investor refused to interview they would subpoena them? A. We discussed it as a possibility. I don't recall specific instances where they directed us to issue a subpoena to an investor as a result of him not consenting to an interview.

Q. There was some that did not consent to interviews? A. I believe that some of the other agents may have talked to some investors who chose not to be interviewed. I'm not certain about that, though.

Q. And they were not subpoenaed? A. No, sir, I don't believe they were.

Q. Was any investor subpoenaed to appear before this grand jury, not just those that were interviewed successfully or unsuccess (96) fully, but any investor interviewed simply as an investor? A. Well, there was an investor in Southern California out of San Diego who testified before the grand jury, I believe, but I don't know if he was simply invited to come or if he was actually subpoenaed. I presume that he was subpoenaed because a subpoena would have been necessary for him to receive travel reimbursement. There was also one other investor in the Los Angeles area who I believe was subpoenaed to testify, but his role went beyond that of just an investor. I believe he was also an associate or at least a former acquaintance of Mr. Kilpatrick.

Q. I assume that the interviews were recorded in some fashion either by a tape recording machine or by notes taken by the agent? A. Notes?

Q. Notes. A. Yes, sir.

Q. And the interview summaries were prepared? A. In most cases I believe that either notes and/or summaries were prepared. There may have been instances where there was very little information and perhaps no notes were prepared.

Q. Now, you testified before the grand jury on a number of occasions, did you not, Agent Mendrop? A. Yes, sir.

Q. Did you ever present any of those interviews to the grand jury? (97) A. I don't recall having done that.

Q. Do you know whether or not they were ever presented to the grand jury by any witness? A. I don't believe they were.

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(98) *** Q. Would it be fair to say that a substantial number of the investors whose tax returns were requested and received were requested as a result of getting the lists through the grand jury of the investors? A. Not exactly because we had a large number of investors' names prior to the start of the grand jury.

Q. Could you give me a percentage? Not offhand, not without checking into the records.

Q. Wouldn't be none, you wouldn't have had every investor prior to the time— A. I don't believe so, no.

Q. And I assume it's more than one. A. It would be more than one.

Q. What was the purpose of requesting the returns of these investors? A. We wanted to see whether the deductions relating to the investments had been taken on the returns.

(99) Q. For what purpose was that? A. Well, unless deductions had actually been taken, there wouldn't have been any harm to the government in this matter.

Q. How many returns have you compiled through your requests? A. Offhand, I can't give you a figure. I can tell you that

it fills three or four drawers of a large file cabinet. I don't know the exact number.

Q. And those returns are in with the grand jury documents? A. The returns have been kept with the Internal Revenue Service in the offices of the Criminal Investigation Division.

Q. So the tax returns that were requested and received are in the I.R.S. offices? A. That's correct.

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(107) *** Q. Do you know who Julie Tuttle is? A. No, sir.

Q. Do you know who Connie Strombech is, S-t-r-o-m-b-e-c-h? A. Yes, sir.

Q. Who is she? A. She is a tax auditor in the Denver office of I.R.S.

Q. Is that the civil examination division? A. That's correct.

Q. Dale Coffin, C-o-f-f-i-n? A. No, sir.

Q. Barbara Peterson? A. No, sir.

Q. Betty Castaldi, C-a-s-t-a-l-d-i? A. No, sir.

Q. I'll try this next name, Nancy Wasrzyniak, W-a-s-r-z-y-n-i-a-k? (108) A. No, sir.

Q. Patricia Stewart? A. No, sir.

Q. What did Connie Strombech do in this investigation? A. We had several tax auditors who assisted us in computing the tax effect of having invested in these tax shelters. By that I mean that they looked at the tax returns of the investors and computed the tax that was lost to the government by the investor having taken this particular investment.

Q. In other words, you used the tax returns that you previously testified were requested and did a recomputation of the tax due and owing on those returns? A. Yes, sir.

Q. And as I remember, you don't recall how many tax returns were actually recomputed or were requested and returned? A. No, sir, I don't recall right now.

Q. Do you have some idea of the number of tax returns which were recomputed during this process by these tax auditors? A. No, sir, I don't.

Q. Did you receive results of their computation? A. Yes, we did.

Q. Were these divided between the methanol shelters and the coal shelters? A. Well, we differentiated between the two, yes.

Q. So that you recomputed the tax due and owing if you (109) disallowed the deduction for the methanol program and you did the same for the coal program? A. That's correct.

Q. Were the results of that recomputation presented to the grand jury? A. No, sir.

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CROSS EXAMINATION
BY MR. ALEXANDER

(148) *** Q. Now, if you wanted the code today—strike that. With regard to the investor interviews that were conducted, sir, what was the purpose in interviewing those investors, if you would tell us? **[IRS Agent Richard Mendrop]** A. Simply wanted to gather what evidence that might be available from the investors to include any correspondence they had received, any representations that had been made to them, any records that they had that pertained to these tax shelters.

Q. All right, and was there also under consideration by the grand jury potential mail fraud charges? A. Yes, sir. We were interested in any items that had been sent through the mails which would have constituted the basis for mail fraud violation.

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(149) *** Q. Now, can you help us, sir, with regard to why the investor information was not presented to the grand jury? A. That was a decision made by Mr. Snyder and Mr. Blondin.

Q. So they would have to help us in that? A. Yes, sir.

Q. Now again, if I asked you with regard to the tax computations that were prepared, as I understand, they were not presented to the grand jury; is that correct? A. That's correct.

Q. And whose decision was it that they not be presented to the grand jury? A. Mr. Snyder and/or Mr. Blondin.

Q. All right, sir.

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DIRECT EXAMINATION
BY MR. WALLER

(171) *** Q. During March of 1982, did you have—or strike that. During March of 1982, were you contacted by any representatives of the Internal Revenue Service regarding these investments? **[William J. Herman, Jr.]** A. Yes.

Q. Do you recall when in March of 1982 you were first contacted? A. In the early part of the month. I don't have the exact date.

(172) Q. Do you recall who contacted you? A. It was a person that represented himself as an I.R.S. agent, and I believe the last name is Burke.

Q. What were the circumstances of that initial contact? A. I received a phone call in my office where I practice medicine to the extent that there were investigators in the Houston area questioning investors in the partnership offered by United Financial Operations and if I would be interested in answering a questionnaire or actually being interviewed as such and having a questionnaire filled out. That was the original proposal.

Q. Did the agent indicate to you whether or not there was a grand jury investigation going on at that time? A. Yes, there was—that was the knowledge of mine and in the conversation I surely asked about this. This was a well-known fact, and I certainly indicated or certainly I was of the belief that this was in conjunction with that investigation.

Q. Did he indicate to you whether or not your opportunity to interview with him was a voluntary interview? A. Yes, he indicated that it was a voluntary interview. However, I had indication that had I not cooperated I might have two consequences, one being subpoenaed by the grand jury and the second being a personal type of investigation.

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(175) *** Q. Did any of the questions go to the deductibility of the investment by you on your individual return? A. Yes, absolutely. In fact, the overall tone and nature of the questionnaire, in my opinion, at that time—and it continues to be my opinion—was primarily directed towards the tax implications of the investments on my part, as far as—well, also on the conduct of the presentation of the material on the part of the representatives of UFO and the general partners.

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DIRECT EXAMINATION
BY MR. WALLER

(241) *** Q. Is it fair to say that you or Mr. Mendrop would decide who needed to have access to grand jury material initially and at that point and after that point in time you would notify Mr. Snyder or Mr. Blondin? **[IRS Agent Paul Raybin]** A. I don't think you can say that as a generalization, no.

Q. That happened in some cases? A. There were occasions when, such as with I.R.S. management, Mr. Mendrop and I were

informed by our manager of people who needed to be included in the 6(e) for the purposes of supervisory controls and we would then have discussion with Mr. Snyder or Blondin regarding that a request had been made to us by our management.

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DIRECT EXAMINATION
BY MR. TREECE

(243) *** Q. Mr. Raybin, was it your custom when you went out to conduct an investigation while the grand jury was ongoing to represent yourself as an agent of the grand jury? **[IRS Agent Paul Raybin]** A. No.

Q. Did you ever do that? A. I don't believe I ever used the term "agent of the grand jury" when contacting a witness.

Q. How about in your interviews of various persons? A. Again, I don't believe I ever used that term.

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CROSS EXAMINATION
BY MR. ALEXANDER

(260) *** Q. You testified about tax auditors computing a tax in connection with investors. Was there any civil purpose whatsoever in connection with the making of those computations, (261) sir? **[IRS Agent Paul Raybin]** A. No.

Q. Was any of that material ever turned over to anybody that had a civil function at the Internal Revenue Service that was— A. No.

Q. With regard to the indexers, the people that were working on the indexing for use with the computers, do you recall that, sir? A. Yes.

Q. Were those indexers given any instructions with regard to Rule 6(e) secrecy? A. Yes.

Q. Who gave those instructions, do you recall? A. I would have.

Q. What did you tell them? A. During a meeting, the initial meeting when we got the group of people together that were going to be doing the indexing, I instructed them that it was a grand jury investigation and that as a result of that any information that they were exposed to during their indexing or the responsibilities that they had with regard to this investigation had to be maintained secretly like any other grand jury information that was obtained, if they had any experience in that area. If they had no experience, for those that had no such experience, I went on to explain that the information was required to be maintained in (262) the office where they are going to be doing the work and that they could not disclose any of the information to any other outside source.

Q. Now, with regard to material that you collected or gathered during the grand jury investigation, whether gathered by means of a subpoena or by means of a voluntary turnover by a witness, did you ever turn over any such material to the Internal Revenue Service for use in civil connections? A. No.

Q. Now, with regard to witnesses who were interviewed outside of the presence of the grand jury, whether it be investors or other witnesses—are you with me so far?—who would conduct those interviews for the most part, sir? A. Primarily, it was either Mr. Snyder or Mr. Blondin.

Q. And would you be present and assist at the interviewing of those witnesses? A. Quite often, yeah.

Q. And was any record made out of the grand jury interviews of these witnesses? A. Often there was a taped transcript or a tape recording of that interview that was later transcribed.

Q. All right. Now, did you at any time ever show a witness a grand jury transcript of someone else's testimony? A. No.

Q. And if you recall, sir, did you ever tell a witness what (263) another witness had said before the grand jury? A. No.

Q. Now, you also interviewed investors, am I right, sir? A. To a limited degree, yes.

Q. And were there some other witnesses that you may have interviewed outside the presence of Mr. Blondin or Mr. Snyder? A. Yes.

Q. Now, when you interviewed these witnesses, how did you introduce yourself, sir? A. I showed them my credentials and explained to them I was a special agent with the Criminal Investigation Division, or just with the I.R.S., assisting the Department of Justice in a grand jury investigation.

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(266) *** Q. Now, did you at any time describe yourself to a witness as an agent of the grand jury, sir? A. I don't recall ever using that term with a witness.

Q. Was that a term of your choosing or did someone else use that term when talking to you? A. I guess the first time I heard that term was from (267) discussions with attorneys in the U.S. Attorney's Office and Department of Justice. It's not my term.

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RE -DIRECT EXAMINATION
BY MR. NESLAND

(279) *** Q. Is it fair to say then he'll be able to identify each of the people on the 6(e) order and tell us what their function was and why they were put on there? **[IRS Agent Paul Raybin]** A. I don't know what his recollection as to those people are. We would have reviewed the individuals or group of individuals with Mr. Snyder. He would have given us the okay. I do not know whether he would specifically know the names of the individuals.

Q. He might recall a dozen or so that you couldn't recall as to whether they were on there? A. As I remember, we were going

over that on Thursday, one of the group that I didn't specifically recall.

Q. Could you answer my question, Mr. Raybin? A. What—

MR. ALEXANDER: The question calls for speculation, Your Honor, in the first place.

THE COURT: It does, sustained.

Q. (BY MR. NESLAND) All right. He made the decision who to put on the list. Isn't it fair to say that you made the decision to make the disclosure to Mr. Arbogget? A. Yes.

Q. All right, and you made the decision to make the disclosure to Mr. Romero? (280) A. Yes.

Q. And I believe you testified you talked to another agent. What was his name? A. Kathleen Budd.

Q. All right, and I assume you made the decision to make the disclosure to Kathleen Budd? A. Yes, I did.

Q. So that he made the decision after you'd made the disclosure that you ought to put them on the list? A. No, in the general sense, Mr. Snyder made—in almost all cases Mr. Snyder made the decision prior to disclosure being made. In those three instances, he did not.

Q. You made that decision? A. I just testified that I did.

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RE -DIRECT EXAMINATION
BY MR. TREECE

(323) *** Q. You gave an affidavit in Civil Action 92-5M-1545 on or about December 10, 1982; is that correct? **[IRS Agent Paul Raybin]** A. Yes, on that date regarding that lawsuit, at that time.

MR. TREECE: May I approach the witness, Your Honor?

THE COURT: Yes.

Q. (BY MR. TREECE) At that time you represented to this court, this United States District Court, did you not, that you were sworn in as an agent of Federal Grand Jury 80-2, Judicial District of Colorado, and that as an agent of that grand jury, your job was to provide investigative assistance; is that correct? A. I did sign that document, yes.

(324) Q. And you testified—or you signed this document, this affidavit, that you acted as an agent for that grand jury through June '81 when it expired; is that correct? A. Yes.

Q. Okay, and then further in his affidavit, you represented to this Court that you acted as an agent of Grand Jury 81-2 from July 8, '81, until that grand jury returned an indictment; is that correct? A. That affidavit does state that, yes.

Q. So you have—did you testify earlier today that you had never represented yourself to be an agent to the grand jury to anybody? Was that your testimony? A. I believe my testimony was I never represented myself as an agent to any witness that I talked to during the course of the investigation.

Q. So you have represented yourself as an agent of the grand jury is that correct? You agree with that? A. That representation is made in that statement and that's the result of semantics as opposed to in actuality, I guess.

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DIRECT EXAMINATION
BY MR. ALEXANDER

(364) *** Q. Now, at any time during this investigation, sir, did you have any contact or take any directions from people on the civil side of I.R.S. who were involved in civil aspects of this case? **[IRS Agent Richard Mendrop]** A. No, sir.

Q. All right. Now, sir, with regard to your duties, did you testify before the grand jury as a part of your investigative duties? A. Yes, sir.

Q. And would you tell us generally, sir, again, in connection now with your duties in connection with this grand jury investigation, how would you describe your duties? A. Primarily, to assist the government attorneys in whatever needs they had as far as scheduling of documents, getting documents in order, reviewing documents, assisting them in the (365) conduct of interviews outside the grand jury.

Q. All right, sir, Now, in connection with your appearances before the grand jury, were you sworn before you testified before the grand jury, sir? A. Yes, sir.

Q. And who administered the oath to you? A. I believe it was either the foreman or assistant foreman of the grand jury.

Q. Was that true of both the first grand jury and the second grand jury? A. Yes sir.

Q. As a matter of fact, actually, even though you had been sworn, were you subsequently sworn on various occasions when you appeared before the grand jury? A. I believe on almost every occasion that I appeared, I was sworn.

Q. You took the oath again? A. Yes, sir.

Q. Do you happen to know why you were administered an oath after once you had been put under oath, sir, a subsequent oath, if you know? A. I'm not sure I understand your question.

Q. All right. Did anyone explain to you why you were given a second and third and fourth oath after you had— A. Oh, on each subsequent appearance before the grand jury?

(366) Q. Yes, sir. A. I didn't know for sure. I thought it was the general practice.

Q. All right, sir. Now, when you first went before the grand jury after you were sworn in, Mr. Snyder also purported to give you an oath, did he not? A. Yes, sir.

Q. Now, the oath given or the purported oath given by Mr. Snyder, was that before you were sworn in by the foreman or deputy foreman or after you were sworn? A. That was after.

Q. Was that true of the second grand jury also, that you only received a purported oath from Mr. Snyder after you had been sworn in by the foreman or deputy foreman? A. Yes, sir.

Q. Now, the phrase "agent of the grand jury," sir, was that a phrase that you had used prior to this investigation? A. I was not familiar with the phrase prior to this investigation.

Q. And how did you become familiar with it in this particular investigation? A. I believe the first time I heard it was from Mr. Snyder.

Q. And have you ever referred to yourself, when talking to a witness, as an agent of the grand jury? A. No, sir.

(367) Q. And when you conducted any kind of an interview or even just picked up documents, did you ever announce that you were an agent of the grand jury? A. No, sir, I don't believe I used that wording.

Q. Did you have a standard, more or less, procedure that you followed in introducing yourself to a witness? A. Yes, sir.

Q. And would you tell us how you would introduce yourself, sir? A. I would usually show them my credentials and inform them that I was a special agent of the I.R.S., that I was assisting in a federal grand jury investigation, assisting the U.S. Attorney's Office and other government attorneys.

Q. All right, sir. Now, in this purported oath that Mr. Snyder gave you, that oath was to the effect that you were to keep secret all grand jury material and not make any improper disclosures; isn't that correct? A. Yes, sir.

Q. And did you, during the course of this investigation, make any improper disclosures, sir, to your knowledge? A. No, sir.

Q. Now, did the foreman of the grand jury at any time instruct you in your duties? A. No, sir.

Q. Would I be correct if I were to say that all of your own instructions came from either Mr. Blondin or Mr. Snyder? (368) A. Yes, sir.

Q. Now, there came a time when Mr. Scharf joined the government team; is that correct? A. Yes, sir.

Q. Was that subsequent to the indictment? A. Approximately around that time, yes, sir. I believe it was—he had participated in a review procedure, I believe, sometime before the indictment. As to when he became fully involved with the matter, I'm not certain, but he did get involved quite extensively at or about the time of the indictment or shortly thereafter.

Q. Now, did Mr. Scharf ever appear before the grand jury? A. No, sir, I don't believe so.

Q. Now, if we could, sir, I would like to direct your attention to the procedures, the security procedures, that were used to maintain and store grand jury material. Going back to when the investigation began, did you have a room at the outset where grand jury materials were kept? A. Yes, we did.

Q. Where was that room, sir? A. That was in the Federal Building here in the U.S. Attorney's Office.

Q. And that would be what, in January of '81, approximately? A. Yes, sir.

Q. And how long did you maintain—strike that. The United (369) States Attorney's Office on the 12th floor? A. Yes, sir.

Q. Now, is there a lock on the door such that you can't enter the United States Attorney's Office section without either knowing a code or having someone authorize you to enter? A. That's right, a combination is necessary or recognition by the receptionist.

Q. Now, what kind of a room was the grand jury materials stored in in the United States Attorney's Office? A. It was a relatively small locked room.

Q. Were there keys to the room? A. There were keys.

Q. Did you have a key? A. Yes, sir, I did.

Q. Did Mr. Raybin have a key? A. Yes, sir.

Q. Now, what kind of records were kept in there, generally speaking? A. These were principally the records that were collected from the summonses or subpoenas that were issued by the grand jury and any other records that we had collected during the course of the investigation with the exception of income tax returns and certain records which had been collected prior to the initiation of the grand jury.

Q. Were transcripts kept in that room, sir? (370) A. Yes, sir.

Q. All right. Now, were there any procedures adopted as to who could enter the room and who could not enter the rooms? A. There were procedures governing admittance, yes, sir.

Q. Would you tell us what those procedures were? A. The only people permitted in the room were those who were listed on the 6(e) list. As a practical matter, only Special Agent Raybin and myself were in the room for the most part, and when the attorneys from Washington were up, they would join us in that room. The only other people that were permitted in the room were only there when we were there to supervise them. I don't recall that people were ever permitted in there unless one of us was present. By "us," I mean either one of the attorneys or Special Agent Raybin or myself.

Q. Now, during the time that the grand jury material was stored in this room in the United States Attorney's Office, were witness interviews conducted in that room or in another room? A. Well, there were a few occasions when I believe some wit-

nesses were brought into that room, but for the most part all interviews occurring outside the grand jury were conducted in other rooms in the U.S. Attorney's Office or elsewhere.

Q. Now, was the door to this particular room left locked or unlocked when you were not working in the room? A. We locked it.

(371) Q. And did you at any time authorize anybody that was not on the Rule 6(e) list to go in that room and remain in there alone? A. No, sir.

Q. To your knowledge, did anybody else on the government team? A. Not to my knowledge.

Q. Now, there came a time when you moved from that room; is that correct? A. Yes, sir, that was in November of 1981.

Q. And where did you move to, sir? A. We moved to the courthouse, third floor.

Q. And what kind of a room was that, sir? Excuse me, that's this very courthouse we're in? A. Yes, sir.

Q. What kind of a room was that? A. This was a little bit larger office space. It was actually two rooms connected by a door. The doors—special locks had been installed on those doors so that the keys were controlled by the people on the 6(e) list, including Agent Raybin and myself, and the same rules were in effect as far as admission to the room as were in effect with the previous room.

Q. Well, now, do you happen to know whether or not new locks were installed in those doors when you designated those rooms for storage of grand jury material? A. To my knowledge there were new locks installed.

Q. And you had a key and Mr. Raybin had a key? (372) A. Yes, sir.

Q. And the United States Attorney's Office had a key? A. Yes, sir. Well, excuse me, when you said the U.S. Attorney's

Office had a key, I don't believe at that point that they did have a key. I think that the keys were provided to us by the clerk of the court, Mr. Manspeaker, and he provided keys to Agent Raybin and myself and we made keys available upon request to attorneys Snyder and Blondin whenever they needed access.

Q. Did Mr. Snyder or Mr. Blondin direct you to keep the keys to those rooms then? A. Yes, sir.

Q. And again, was anyone not on the 6(e) list allowed entry into that room? A. Not to my knowledge.

Q. Now, again, did there come a time when you moved out of the courthouse? A. Yes, sir, we moved out of the courthouse in May of 1982.

Q. And where did you go at that point? A. Across the street to the U.S. Post Office, on the fourth floor.

Q. Excuse me, going back a moment to when you were at this second space on the third floor— A. Yes, sir.

Q.—how did you move the material from the U.S. Attorney's (373) Office to the courthouse? A. Well, Agent Raybin and I, we were able to secure some assistance from people provided to us by the I.R.S. We boxed up all the materials and we supervised the move. We actually accompanied the materials as they were moved from one location to the other.

Q. So the materials were not out of your presence then? A. Right. We would make sure that the materials were loaded onto a truck or whatever vehicle we had. During the actual ride over in the truck, I can't say that we were actually in attendance with that truck, but one of us was on the other end to receive the material when it arrived.

Q. I see, and were there any labels on the boxes or anything? A.The labels on the boxes would include the stickers put there by the grand jury and any of the writing that happened to be on the

boxes at the time we received them, at the time the grand jury received them.

Q. Would you go down into the basement or how did you—you just took a regular route right over to the third floor? A. Oh, yes, sir.

Q. Then in May of 1982— A. In fact—you say "regular route." As I think about it, we actually took the material in the freight elevator, went all the way down into the basement and crossed over and came back up, so actually we didn't use the public hallways to transport (374) it.

Q. As a matter of fact, you did that for security reasons, didn't you? A. Yes, sir.

Q. To preserve the security of the grand jury material; isn't that correct? A. That's correct.

Q. Then did you—you said May of '82 you moved again? A. We did.

Q. And went to the Post Office Building? A. Yes, sir.

Q. What floor were you on there? A. The fourth floor.

Q. Now, were any special arrangements made before you moved to the post office and put the grand jury material on the fourth floor? A. Again, new locks were installed because that building was under control of GSA, so they put locks in that only we—by that I mean Special Agent Raybin and myself and the attorneys—has access to those keys. Even the GSA was not given keys to those offices.

Q. Did Mr. Snyder and Mr. Blondin tell you to maintain custody of those keys? A. Yes, sir, they did.

Q. Pardon? (375) A. Yes, sir.

Q. Did anybody from GSA have a key, do you know? A. Not to my knowledge.

Q. Or did the cleaning staff have a key? A. The only cleaning that occured was during the times that we were occupying the offices.

Q. All right, and did you follow the same security procedures, namely that no one on the 6(e) list was allowed in the room? A. That's correct.

Q. And that you had to be accompanied by authorized personnel if you were to enter that room and you weren't on the 6(e) list; isn't that correct? A. Yes, sir

Q. Did there come a time then in October of '82 when you once again moved all this material? A. Yes, sir, we did that.

Q. And where did you move on this occasion, sir? A. To the Customs House here in downtown Denver.

Q. Now, again, before moving to the Customs House, were any special arrangements or special procedures followed to ready the rooms for the grand jury material? A. Again, this time we had the deadbolts added to the existing locks and those keys were kept under the same controls as we had before. In addition, the doors on the rooms that we were given at the Customs House had a ventilation area in the lower (376) part of the doors so bars were installed to prevent access through that ventilation area.

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CROSS EXAMINATION
BY MR. NESLAND

(396) *** Q. You testified that the grand jury materials were originally kept on the 12th floor of the U.S. Attorney's Office in the Federal Building; is that correct? **[IRS Agent Richard Mendrop]** A. Yes, sir.

Q. And then as I understand it, in November of '81, you moved them to the third floor of the courthouse? A. Yes, sir.

Q. All right. Did you move everything from the 12th floor over to the third floor or did you leave some over in the U.S. Attorney's Office and bring some over here? A. Initially, we left a few things. There were a few records (397) left behind. Now, whether —I don't believe—I don't know whether those were grand jury records. We may have kept some copies of few transcripts that we were finding that we needed more frequently. I can't recall if we actually did or did not. The reason I say that, there was a file cabinet left behind with some correspondence, memoranda, that we kept, I believe, in the U.S. Attorney's Office for a while before it was moved.

Q. Ultimately, it was moved over but you don't know when, that file cabinet? A. Yes, sir.

Q. But for a period of time, it remained behind on the 12th floor? A. I believe so.

Q. Who had the keys to that office? A. Special Agent Raybin had a key, I had a key. The keys in that instance were handed out by the administrative assistant in the U.S. Attorney's Office, I don't recall her name, so she had whatever other keys there were.

Q. So that other people in the office had keys to that particular office on the 12th floor? A. Well, I'm not certain. When you say other people— in fact, her name I believe was Miriam Corbin. She gave us the keys. Now, whether she had other keys that she gave to other people, I'm not aware of that.

Q. How many witness interviews were conducted in that room on (398) the 12th floor? A. I don't know offhand. There were a number of interviews conducted but I can't say for sure how many.

Q. Was Mr. Birchall ever in that room? A. Yes, he was.

Q. Then in November 1981 when you moved to the third floor, as I understand it, special locks were incorporated into the door leading to the third floor office? A. I believe the locks were

rekeyed because there was only one set of locks. I believe those locks existed before we moved in so we were told that they had rekeyed those locks and we obtained the keys from Mr. Manspeaker.

Q. And you and Agent Raybin kept those keys? A. We each had a key, yes, sir.

Q. And neither Mr. Snyder nor Mr. Blondin had a key? A. That's correct.

Q. Were the documents in this investigation, the grand jury materials in this investigation, the only materials kept in that room or were there other grand jury investigations going on which some of the information was kept in that room? A. No, sir, it wasn't — no information from other grand juries was comingled with the grand jury information on this matter.

Q. All right. Then in May of 1982, you moved all of the information from the third floor over to the U.S. Post Office? (399) A. Yes, sir.

Q. And once again, is it your testimony that you had special keys there? A. Yes, sir.

Q. And you kept one and Mr. Raybin kept one? A. That's correct and there were other keys. Now, I'm aware of at least one other key, one or two other keys. My group manager, Jerry Bandy, had at least one key, and he may have had — in fact, he had one besides that because there were occasions when he gave a key to one of the investigative aides who was assisting us who would have to come over and do some work, but those people are — they were all on the 6(e), the ones that he provided any keys to.

Q. What, did he keep a copy of the 6(e) list so he could see which people were on there? A. I don't believe he kept a copy but he was aware of who was put on the 6(e) list.

Q. So at any point in time he could recall whether any of those people was one of the 78 people on the list? A. When I say

he gave keys, he gave keys to very few people and it was easy for him to recall the names of the few people that he gave keys to.

Q. Any other keys that you can think of that were floating around? A. No, sir. I believe that those were all of the keys.

(400) Q. Were any grand jury documents or grand jury information kept there in connection with other grand jury investigations independent of the Kilpatrick investigation? A. No, that room was used exclusively for this grand jury investigation.

Q. Okay, and then in October of '82 you moved all of that information over to the U.S. Customs House; is that correct? A. Yes, sir.

Q. All right. Is that office shared with anybody? A. No, sir.

Q. So the only documents or grand jury information that's been kept in any one of these offices are those kept in connection with the grand jury investigation of Kilpatrick? A. Yes, sir.

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DIRECT EXAMINATION
BY MR. ALEXANDER

(409) *** Q. Now, overall, sir, how long did this grand jury investigation last? **[Prosecutor Stephen Synder]** A. From January of 1981 till September 30th of 1982.

Q. Now, that would be the second grand jury, wouldn't it? (410) Didn't the first grand jury start in January of '81? A. That's correct.

Q. I'm sorry, I misunderstood, thank you, and when was an indictment returned in the case, sir? A. September 29th or 30th of 1982.

Q. And were there numerous witnesses called before both grand juries? A. Yes, sir.

Q. And did you collect documents and do all the other things that you do in any other investigation? A. Yes, sir.

Q. Do you have an estimate on the approximate number, how many documents you pulled in? A. I could only estimate, approximately 30,000.

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(412) *** Q. All right, sir. Now, with regard to Mr. Raybin — A. Yes, sir.

Q. — who is Mr. Raybin? A. He was a special agent of the Internal Revenue Service here in Denver, Colorado.

Q. And he was assigned to this investigation? A. Yes, sir.

Q. That's also true of Mr. Mendrop? A. Yes, sir.

Q. Now, were they sworn in before they testified or not, sir? A. Yes, sir.

Q. Who swore them in? A. Foreman or the forelady.

Q. Now, you also purported to give an oath to Mr. Raybin and Mr. Mendrop, did you not? A. Yes.

Q. Did you purportedly give them that oath before they were sworn in by the foreman of the grand jury or after they were sworn in by the foreman of the grand jury? A. After.

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(414) *** Q. Now, did you refer to these agents as agents of the grand jury, sir? A. On several occasions, I did, yes, sir.

Q. And where had you — strike that. Had you had any previous experience with the swearing of agents as agents of the grand jury, sir? A. Yes, sir.

Q. Where had you had this experience? A. Atlanta, Georgia.

Q. And what is the practice there, sir? A. In Atlanta, Georgia, the foreman of the grand jury swears an agent in. He has a formal oath that is sworn to him by the foreman of the grand jury when an agent starts assisting and joining in on an investigation before then.

Q. Is the agent sworn then as an agent of the grand jury? A. Yes, sir, that's what they're called.

Q. Have you participated in proceedings where that's been done? A. Yes, sir.

Q. And this was prior to the time that you took on this (415) investigation in Denver; is that correct? A. Yes, sir.

Q. If you happen to know, Mr. Snyder, is that practice still being followed, if you know? A. I don't know if it's being followed in Atlanta. I know it's being followed in the Southern District of Florida.

Q. Florida? A. Yes, sir, it's been.

Q. You have had experience there, also? A. Yes, several months ago.

Q. And the practice there is to swear an agent as an agent of the grand jury? A. Absolutely, sir.

Q. Now, did you on one occasion in this purported oath advise one of the agents that disclosure could be authorized by the foreman of the grand jury? A. Yes, sir.

Q. Was that correct? A. No, sir.

Q. Did you later correct that statement? A. Yes, sir, I did.

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(416) *** Q. Now, to your knowledge, sir, has there been any disclosure of grand jury material in this case to anyone in the Internal Revenue Service for civil purposes? A. There has been none, to my knowledge.

Q. Now, during the course of the investigation, did you have the occasion at any time to advise the grand jury with respect to civil use of the material that they were about to see or that you were obtaining for them? A. It was discussed at several points, yes, sir.

Q. Well, would you tell us, what did you tell the grand jury about that material? A. I told them that the investigation we were conducting was not a civil proceeding whatsoever, that it was not collection of taxes. I informed them on several occasions, I recall, that it would be completely improper to use grand jury subpoenas to collect material to be used in a civil proceeding or in an audit fashion in any manner whatsoever.

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(417) *** Q. Now, did you at any time make any disclosure of grand jury material to anybody on the civil side of I.R.S., sir? A. No, sir.

Q. Did you at any time authorize any agent acting under your direction and control to make a disclosure to the Internal Revenue Service of grand jury material for civil purposes? A. No, sir, quite the contrary. I informed them on several occasions that it absolutely could not be done.

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Q. Now, Mr. Scharf did not participate in the investigation; isn't that correct? A. No, sir, he did not.

Q. So it's just you and Mr. Blondin who directed it? A. That's correct, after Mr. Barksdale left.

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(432) *** Q. Now, the morning of September 9th, before Mr. Birchall appeared before the grand jury, was he in the U.S. Attorney's Office if you know, sir? A. Yes, sir, I think he came up there.

Q. And was he in the room where you stored the grand jury materials? A. Yes, sir, I believe he was.

Q. Was he alone in that room? A. No, sir.

Q. To your knowledge, was Mr. Birchall ever alone in that room? A. No, sir.

Q. Did you ever authorize him to go in that room alone? A. Absolutely not.

Q. Did you follow a routine procedure with respect to who could enter that room and under what circumstances? A. Yes, sir.

Q. What were the procedures that you had all adopted, sir? A. Unless a special agent was there, the last person that left (433) that room closed and locked the door.

Q. Was anyone that was not on the 6(e) disclosure list allowed in that room alone? A. No, sir.

Q. Was that true of all three locations or four locations where you stored grand jury material at various times? A. Yes, sir.

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(466) *** Q. Now, when the grand jury adjourned on the 19th, did you have a discussion with Mr. O'Donnell about a Professor Hjorth? A. Yes, sir, I believe he asked me during the luncheon recess (467) whether his expert could testify the following morning.

Q. And what did you tell him? A. I told him he could.

Q. All right. A. Mr. O'Donnell told me that he wanted his expert to testify before he finished giving his testimony because he didn't want the grand jury to think he was in there blowing smoke or it was unsupported, what he was saying.

Q. So then did you put Professor Hjorth into the grand jury room before Mr. O'Donnell completed his testimony? A. Yes, sir.

Q. That would have been on the what, the morning of the 20th? A. Yes, sir.

Q. In the meantime, Mr. O'Donnell did testify on the afternoon of July 19th, did he not? A. Yes, sir.

Q. And you—did you see him that evening— A. No, sir.

Q. —after the grand jury was over? A. No, sir, not really, not that I recall.

Q. In other words, you went on about your business and he went on about his business? A. Pretty much. There might have been a casual parting.

Q. But other than that, you didn't have any evening meeting with Mr. O'Donnell? (468) A. Oh, absolutely not.

Q. I'm sorry, sir, it wasn't clear, and then the next morning Professor Hjorth appeared before the grand jury? A. Yes, sir.

Q. And he testified for what, about an hour and a half? A. Hour and a half, hour and 15 minutes, something like that.

Q. And then you examined Professor Hjorth, did you not? A. Yes, sir.

Q. Now, again, did Professor Hjorth testify as to factual matters or legal matters? A. Professor Hjorth testified to legal concepts he had.

Q. Did he indicate whether or not he was familiar with the facts himself because of his own investigation or not? A. He said he had almost very little understanding of the facts.

Q. So that his testimony was on the law, is that it? A. Almost exclusively.

Q. Now, during the luncheon recess — strike that. When the luncheon recess came, the grand jury broke up but Professor Hjorth remained in the grand jury room; isn't that right? A. Yes, sir.

Q. And you did, too, didn't you? A. Yes, sir.

Q. And at that time, did you have a discussion with Professor Hjorth? (469) A. Yes, sir.

Q. Now, without going into all the detail, what was the general nature of that discussion? A. In the time that he had been before the grand jury, I really didn't understand everything, what he was saying, so I asked him if he would mind talking to me awhile so he could explain to me because I really didn't understand what he was saying, and he said he would, so we talked like another 30 minutes.

Q. Again, did this concern factual matters or legal concepts? A. Just his legal concepts he had regarding circular financing.

Q. Now, during that conversation, sir, did you ever threaten to prosecute Professor Hjorth? A. No, sir.

Q. Did you, however, tell Professor Hjorth at one point that you would see him in court? A. Yes, I did.

Q. How did that remark come to be made? A. I had asked Professor Hjorth, because his theories were quite involved — my question to him was, could a private citizen in the United States create money; that is, increase the monetary supply of the United States? And he responded to me like two or three times, a person could create basis in property, a private person could, and I finally asked him like the third or fourth time, can a private citizen of the United (470) States increase the monetary supply, and he said, Yes, they could, and I said, I'll see you in court on that one, Professor.

Q. All right. Now, did you at any time impugn Professor Hjorth's intelligence? A. No, sir.

Q. But you certainly differed with his theories, did you not? A. I didn't agree with his theories, no, sir.

Q. Now, did Professor Hjorth also appear briefly before the grand jury on the afternoon of July 20th? A. Yes, sir, he did.

Q. And did you examine him? A. Yes, sir, three or four questions.

Q. And at that time, did Professor Hjorth express to the grand jury his appreciation to you for prodding him in thinking out his theories? A. Yes, sir, he did.

Q. Following Professor Hjorth's testimony on the 20th, did Mr. O'Donnell appear again to conclude his testimony? A. Yes, sir.

Q. And did he then proceed to testify? A. Yes, sir.

Q. Now, following the conclusion of his testimony, did you have a conversation that afternoon with either Mr. O'Donnell or Professor Hjorth? A. Yes, sir.

(471) Q. Was it a long conversation, short or— A. Half an hour.

Q. Where did it take place? A. Grand jury witness room.

Q. And what was the nature of that conversation, sir? A. Mr. O'Donnell had not finished his testimony, what he wanted to say on the record, and the grand jury had to leave because they had to get their cars out of the parking lot before 5:00. If I remember, that's the time they had to get them out by, and so briefly, in the grand jury witness room, he explained to me some other things regarding his defenses. I think he told me the names of one or two lawyers that he had consulted back in 1977 and 1978 regarding the legitimacy of circular finance.

Q. This is Mr. O'Donnell speaking? A. Yes, and several other points, four or five points.

Q. Now, were Special Agent Raybin and Special Agent Mendrop present during that conversation, do you know? A. Special Agent Raybin was, I think. Special Agent Mendrop was in and out.

Q. Now, have you seen or talked to Professor Hjorth since that time? A. No, sir.

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(476) *** Q. All right, sir. Now, Mr. Snyder, you had the occasion during this investigation to issue what we might call letters of assurance, did you not? A. Yes, sir.

Q. Now, could you tell us what was the occasion for your issuing letters of assurance, sir? A. Approximately two months into the investigation, I had subpoenaed some individuals who were represented by Mr. Bernard Bailor, attorney for Caplin & Drysdale. Additionally, he represented virtually every other significant witness in the case, and Mr. Bailor said he wanted to think whether he wanted to allow these people to testify.

Mr. Bailor called me up on the phone and his exact words were, "No tickie, no talkie." That is, before any of his clients would testify, they would have to receive a letter of assurance. Well, some type of immunity I believe is the way he put it. I asked him did he want formal statutory immunity or did he want letters of assurance, and he said letters of assurance were fine, and at that point set up a procedure of how we would issue the letters of assurance, when we would meet it and how we would conduct ourselves in that regard.

Q. Were these assurances always placed in a letter? (477) A. Always.

Q. And did you sign those letters? A. I was the only one who signed them.

Q. Now, did you set your mind on this, did you ever give anyone what might be called oral assurances? A. Absolutely not.

Q. Always done by letter? A. That's the only way it should be done, sir.

Q. Did you at any time seek immunity for anyone? A. No, sir.

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(481) *** Q. (BY MR. ALEXANDER) During the course of the investigation, Mr. Snyder, on several occasions did two

agents read transcripts from the prior grand jury to the second grand jury? A. Yes, sir.

Q. And how did that come about, sir? A. If I remember right, I was having one agent do it and another agent do it and they both had colds and sore throats or something and they asked if they could do it together, to break it up, because they couldn't take it anymore, and I said, yes, go ahead.

Q. And did you advise the grand jury that this would be done—strike that. Did you—what instructions, if any, did you give the grand jury with regard to any questions they might (482) have? A. Of the agent?

Q. Yes, sir. A. I told them under no circumstances should they ask an agent a substantive question when he was reading transcripts.

Q. Were there occasions when you and Mr. Blondin were in the room when transcripts were read? A. That's correct.

Q. And did you explain that to the grand jury? A. Yes, sir.

Q. And what did you say, if anything, about any questions they might have? A. I said they were to ask no substantive questions and I told the agents not to answer any.

Q. Yes, sir. A. And I said if there were questions, just stop it, come get me or Tom, and we'll go back in and handle it.

Q. Did you tell the grand jury that on one or two occasions? A. Yes, sir, and I also told the agents that.

Q. And then were the agents sworn, do you know, before they read the transcripts? A. To my knowledge, they were.

Q. And did the agents answer any questions? A. To my knowledge, they didn't.

Q. You've reviewed the grand jury transcripts, haven't you? (483) A. Yes, sir.

Q. You've reviewed the colloquies, haven't you? A. Yes, sir.

Q. Are there any questions in there answered by the agents? A. No, sir.

Q. Were you present when any of these joint readings went on, if you recall? A. I think I was during one or two.

Q. Was the procedure for one agent to read the question and the other to read the answer? A. Absolutely.

MR. ALEXANDER: I have no further questions, Your Honor.

CROSS EXAMINATION
BY MR. NESLAND

Q. You testified that you reviewed the grand jury transcripts to determine whether or not the agents answered questions before the grand jury. Did you find anywhere in the grand jury remarks of testimony where you gave instructions to the grand jury not to ask questions of the agents? **[Prosecutor Stephen Synder]** A. Yes, sir, I believe I did.

Q. Where? A. I would have to get the colloquies and go through them.

Q. Okay. If you had the opportunity, would you do that? A. I could do it now.

(484) Q. All right, you can do it after we recess. A. That's fine.

Q. All right. You were not present on almost every occasion that transcripts were read to the second grand jury, were you? A. I didn't keep count of it. I was present sometimes, other times I was not.

Q. The agents were in there alone; isn't that correct? A. Yes, sir, at times they were.

Q. In fact, on some occasions they went out of the grand jury and convened the grand jury in your absence and you came down halfway through the time they were reading the transcripts, did you not? A. No, sir.

Q. You've reviewed the grand jury transcripts? A. Yes, sir.

Q. And you never saw an occasion where you came in the middle of the— A. Yes, sir. At times I would come in the middle of it but they wouldn't convene it. Usually I would come in and say, The agent is going to read. They wouldn't convene the grand jury.

Q. Would you tell me how it is that you can have a transcript where only the agents appear and you never appear? Who convened that grand jury session? A. Usually the grand jury would be sitting continuously. You would have a grand jury that started at 1:30, I would handle a (485) witness from like 1:00 to 2:00, walk out, the agent walks in and starts reading.

Q. All right, and you would simply leave? A. Yes, if I had other business.

Q. And you, as I understand it, you gave instructions to the grand jury not to ask any questions of them? A. That's what I understand, yes, sir.

Q. And you didn't ask any questions of them because you weren't there? A. That's correct.

Q. So there is no question they weren't under examination, were they? A. They were not under examination, no, sir, not in the classic sense of the word.

Q. They simply weren't under examination in any sense of the word, were they? A. Sir, they were witnesses. They were not under examination. They were under examination in the sense that they were reading—they had sworn to read that transcript, whatever transcript they were reading, accurately. In that sense maybe you can call it examination, I don't know, but in the other

sense, in terms of what we usually think of examination, which I'm under right now, no, sir.

Q. Did you say they were witnesses because they were under oath and they were put under oath? (486) A. Yes, sir.

Q. Have you reviewed the transcripts and determined that on a number of occasions when they read grand jury transcripts they were not placed under oath? A. Sir, to my knowledge, they were always placed under oath.

Q. If they were not placed under oath, there is no question in your mind that they were not witnesses; isn't that correct? A. Sir, I think they would still be witnesses because they are in the grand jury room performing that function of reading.

Q. They're still a witness? A. Yes, sir.

Q. Even though they're not sworn? A. Sir, they had been sworn so many times—they had been sworn on numerous occasions.

Q. Who are you talking about? A. Special Agent Raybin and Special Agent Mendrop.

Q. When did you place Special Agent Shea under oath? A. I didn't.

Q. You didn't? A. No.

Q. Was there ever an occasion that you placed Special Agent Burke under oath? A. No, sir, I wasn't present.

Q. Were they ever called to the grand jury and placed under oath by the foreman or forelady or deputy foreman or deputy (487) forelady of the grand jury? A. I don't know, sir. I've read the transcript. At the time that happened, I was in London, England. What happened, I do not know.

Q. All right. You've reviewed the transcript and at no time have you determined that either one of those agents were ever placed under oath by the foreman or forelady or deputy foreman

or deputy forelady of the grand jury; isn't that correct? A. Sir, all three told me they were.

Q. I asked you, have you seen that in any transcript? A. Sir, I did not see it in any transcript, no, sir.

Q. What authority were you relying on when you gave the oaths to the agents, Agents Raybin and Mendrop? A. None.

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(492) *** Q. Rule 6(d) also authorizes the witness under examination to be present before the grand jury. Are you familiar with that rule? A. Yes.

Q. Did you determine whether or not more than one witness could appear before the grand jury before you called Agents Raybin and Mendrop to the grand jury to read the transcripts? A. Sir, I was aware generally of the one witness rule but I just really never put it together in that context.

Q. You never—it was your understanding that they were not appearing as witnesses; isn't that correct? A. No, sir, I wouldn't say that.

Q. It's your position that they were appearing as witnesses, you knew that only one witness could appear at a time; is that correct? (493) A. Sir, that's my position, I guess, that I had agents reading transcripts of a previous grand jury. Whether they're witnesses under examination or something, I really never thought about that and I really wasn't concerned about it. I knew about the two witness rule, sir, or I should say the one witness rule, and I never really put the fact that I had two agents reading grand jury transcripts together with that rule.

Q. Because you never considered them witnesses; isn't that correct? A. No, sir, I just never considered it at all.

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(494) *** Q. Did you obtain a 6(e) order to read the transcripts of the first grand jury into the second grand jury? A. Yes, sir, I believe there was.

Q. If one is unavailable, do you have a recollection of having received one? A. I have no specific recollection of having received one, no, sir, but I recall, when the thing came down to be transferred, I talked to Velma or somebody, and she said that it had been done.

Q. Who had obtained it? A. That, I don't know.

Q. You didn't take it upon yourself to seek a court order to disclose the grand jury testimony from the first grand jury to the second grand jury? A. No, sir.

Q. Have you ever seen a copy of any order to that effect? A. No, sir.

Q. Did you obtain a copy or did you obtain a 6(e) order to move or disclose the grand jury information to the people at Lowry Air Force Base for the purposes of the computer program? A. Yes, sir.

Q. Do you know where a copy of that order is? A. Yes, sir, it will be in the miscellaneous files of the (495) clerk of court.

Q. Would that be the same place that the court order is for the transfer of the—for the reading of the grand jury transcripts from the first grand jury to the second grand jury? A. That one should be there, too. The second one, on the Lowry, I'm sure because I was the one that took it personally to have it signed.

Q. Dallas, Texas, did you get one to take information to Dallas, Texas, for the computer program? A. No, sir.

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(496) *** Q. Was a 6(e) order obtained to take the same kind of computer data to Salt Lake City? A. No, sir.

Q. So it was only Lowry? A. That's correct, if I recall.

Q. Who did you apply to to obtain a 6(e) order for Lowry Air Force Base? A. Honorable Fred Winner.

Q. Did you file any kind of paper? A. Yes, sir.

Q. What did you file, an application? A. Yes, sir.

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(500) *** Q. In the oaths that you've testified were given in Atlanta, Georgia or the Southern District of Florida, they also convert the I.R.S. agent into an agent of the grand jury and instruct him that he's no longer working for the Internal Revenue Service but he's now working as an agent of the grand jury and he owes his allegiance to the grand jury, did they say anything (501) like that? A. Not that I know of.

Q. They make him an agent only for the purposes of maintaining secrecy of any information he receives; isn't that correct? A. I think that's the thrust of it, I don't know. I don't know the history and how this thing started or nothing else. I think that is the thrust of it, but like I say, I can't really remember exactly what the oaths says so I don't know if there is any catch or twist, but I would tend to agree with you, sir, just based upon my memory, that that's probably the reason why.

Q. It's similar, as I understand it, to the kind of oath you gave these agents before this grand jury? A. Once again, you know, I was trying to paraphrase it.

Q. I mean, you were just kind of shooting from the hip on that oath? A. Yes, sir.

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(502) *** Q. You testified quite a bit about your conversation with Professor Hjorth during the luncheon intermission which you testified, I believe, lasted about 30 minutes? A. Yes, sir.

Q. Did you ever inform him that he was a discredit to his profession? A. No, sir.

Q. Did you ever tell him that he was a disgrace to his profession? A. No, sir, not words to that effect.

Q. Did you ever make any kind of comment like that? A. No, sir.

Q. So as Mr. Alexander would ask, if Professor Hjorth said that you made a comment like that, I assume you would call him a liar. A. I don't know if I would call him a liar. I would tell him he was mistaken.

Q. You distinguish that from Mr. Birchall, he's a liar? (503) A. Yes, sir, I do.

Q. And Professor Hjorth is mistaken? A. Yes, I do.

Q. Mr. Hjorth remained in the room after the luncheon break at your request, did he not? A. Yes.

Q. I believe your testimony was that you wanted to ask him some more questions about certain things he testified so you asked him to remain behind? A. I asked him if he wouldn't mind talking to me.

Q. All right, and he obliged you? A. He said, Sure.

Q. Did you make any efforts to determine whether or not any grand jurors remained in that room? A. At that time, when you say make any efforts, I was aware during our conversations there were grand jurors present, yes, sir.

Q. And you continued a conversation in any event? A. Yes, sir.

Q. Would you describe the conversation as casual? A. No, sir.

Q. Would you describe it as heated? A. At some points, yes, sir.

Q. Did you make any efforts to try to intimidate Professor Hjorth? (504) A. No, not really.

Q. If he felt intimidated by your conversation, would you be surprised by that? A. Given what he was saying, no, sir.

Q. Pardon? A. Given the theories he was expressing, no, sir, I wouldn't be surprised if he felt intimidated.

Q. So you had a heated exchange about his professional opinion that he was testifying to before the grand jury, is that what the conversation involved? A. No, sir, I was more trying to figure out what he was saying. I didn't understand at all what he was saying because he kept talking about switching from cash to accrual method and kept talking about how there was value here but that would change it from a cash basis transaction to an accrual basis transaction. He was talking about a lot of tough stuff that I didn't understand and I was trying to understand, to be real honest, because there were couple points he totally lost me.

Q. Did you express disbelief in his opinions to him? A. On some of them, yes, sir.

Q. I believe you testified that you apologized to the grand jury or did you testify you apologized to the grand jury about the discussion you had with him after the luncheon break? A. No, sir.

Q. I may be transposing that from your summary. (505) A. No, sir, I don't believe it's in my summary either, because it didn't happen.

Q. All right. Who were present during the conversation other than you and Professor Hjorth? A. Mr. Declan O'Donnell was there, Mr. Paul Raybin was there, Mr. Roger Schneider was there for part of it, the foreman of the grand jury was in and out, and then there was a grand juror who sat like two or three rows up who always knitted and she was there for part of it.

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(515) *** Q. So you made the decision to issue each of the 23 or so letters of assurance? A. Yes, sir.

Q. Based on your own judgment? A. Yes, sir.

Q. And then there came a time that you stopped issuing those letters; isn't that a fact? A. Yes, sir.

Q. And it was at that time that you reached the judgment that all good things must come to an end? A. Yes, sir.

Q. And you called witnesses in thereafter to invoke their Fifth Amendment; isn't that right? A. Yes, sir.

Q. And you knew when those witnesses were called that they were going to invoke their Fifth Amendment? A. Yes, sir.

Q. That was not a condition for your seeking statutory immunity, was it? A. No, sir.

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(523) *** Q. All right. I just wanted to clarify one thing. You testified to obtaining a 6(e) order to produce information input sheets and deliver them to Lowry Air Force Base? A. Yes, sir.

Q. Do you have any knowledge as to whether or not that same kind of input sheet or document or documents utilizing grand jury materials were sent to Salt Lake City? A. I have no knowledge of that, sir.

Q. Do you know that there was a computer program utilized in Salt Lake City— A. No, sir.

Q. —in this investigation? A. (The witness shook his head.)

Q. Did you know one was used in Dallas, Texas? A. No, sir.

Q. So that would have been done without your knowledge, at least? A. Yes, sir, I wasn't aware of those facts.

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CROSS EXAMINATION
BY MR. TREECE

(541) *** Q. (BY MR. TREECE) You have suggested that perhaps you were not quarreling with the main portions of his opinions that day; is that your statement? **[Prosecutor Stephen Synder]** A. Sir, there were some things that he was saying. I was only trying to understand what he was saying.

Q. I understand that, sir. A. There were other things that he was saying that I disagreed with.

Q. Right, and you disagreed sufficiently with the totality of his opinions that you did not take them as having sufficient merit to justify your reconsidering this indictment; isn't that true? A. Oh, no, sir, we reconsidered whether there should be indictment in light of what his testimony was. That was reconsidered.

Q. Well, you reconsidered it while you were talking to him? A. No, sir.

Q. But you told him you were going to see him in court, which (542) indicated you were telling him you didn't intend to reconsider. A. Sir, the expression I used, "I'll see you in court on that one," is a rather flippant expression meaning whatever—what it means is, I don't think you can support that position anyway, anywhere. I was not at that point indicating that there was going to be an indictment or anything else. I was not trying to insinuate that.

Q. And did you believe that the juror or jurors that were listening to your debate with the witness understood that you were being flippant at that time? A. Oh, I think so.

Q. And they would understand that by the tone of your voice or what? A. No, sir, I think just the whole circumstances. I don't think it was just exactly any big deal that was going on.

Q. Now, you also indicated that Profesor Hjorth might have felt intimidated? A. No, sir.

Q. You did not testify to that? A. He might have felt intimidated, I don't know.

Q. Didn't you say that you thought he might well have felt intimidated? A. Sir, I don't know what Professor Hjorth was thinking or feeling.

Q. Okay. Well, is there something that you said that you (543) believe may have made him think that? A. There was nothing I said that would have given him that—

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RE-DIRECT EXAMINATION
BY MR. ALEXANDER

(597) *** Q. Mr. Snyder, would you tell us again, if you have not already, with regard to the letters to the witnesses. I believe Defendants' Exhibits V-1 and so forth, which state or rather name the targets in those letters, what was the purpose in naming the targets, sir? **[Prosecutor Stephen Synder]** A. Sir, the purpose in naming the targets was to inform the person exactly what the nature and scope of the investigation (598) is so a person could know if they could respond to us. I did not think it was proper just to write a personal letter that says, There is a grand jury investigation, would you please appear.

Q. Were these letters letters to witnesses who were available under service of process, do you recall? A. No, sir, every letter, the person was not available by process, by American process.

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(599) *** Q. Now, there have been—you were asked some questions that pertained to hearsay before the grand jury. Did you on several occcasions in your colloquy with the grand jury ad-

vise them that you would produce live testimony for them if the grand jury wanted it? A. Yes, sir.

Q. Did you also tell them that witnesses had been interviewed and that transcripts and tapes had been played of those interviews? A. Yes, sir.

Q. Did you advise the grand jury that those tapes and the transcripts were available for their examination? A. Yes, sir.

Q. And on the reading of the transcripts, did you also advise them that if they wanted any of the witnesses brought before them to produce live testimony, that you would, if possible, obtain those witnesses? A. Yes.

Q. Now, did you call before the grand jury some witnesses who you had pretty good indication would take the Fifth Amendment if you called them? A. Yes, sir.

Q. Offhand, do you recall how many witnesses you may have (600) called that you knew were going to take the Fifth? A. Not very many, sir. No more than four or five. Not very many at all.

Q. Now, what was your occasion for calling these witnesses that you knew were going to take the Fifth Amendment? A. With regard to the one situation I'm thinking of, the witnesses were there and available. Negotiations with defense counsel, Mr. Muoio, had been unable to reach an agreement. I wanted a record left behind to show that the government had attempted to obtain information from these people and had been unsuccessful because I thought later that may become a, for want of a better word, point of dispute in further proceedings.

Q. And did their attorney understand that you were going to put them in the grand jury and— A. Yes, sir.

Q. —and have them take their Fifth Amendment on the record? A. Yes, sir.

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(619) *** Q. Now, one of my questions—when I asked you about letters (620) being sent to the witnesses, you indicated that-

they were beyond service of process. Were all of the witnesses who received letters, or potential witnesses, beyond service of process, sir? A. No, sir, I wish to correct my testimony. There were several individuals who we subsequently found out that service of process could be obtained on.

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DIRECT EXAMINATION
BY MR. ALEXANDER

(632) *** Q. And as a special agent, do you investigate potential criminal tax violations? **[IRS Agent Gerard F. Burke]** A. Yes, I do.

Q. Did there come a time when you were assigned some duties in connection with the investigation of Mr. Kilpatrick and others? A. Yes, there was.

Q. And in that connection, sir, did you have the occasion to read transcripts before the grand jury? (633) A. Yes, I did.

Q. And prior to the time—strike that. Who asked you to read those transcripts, do you recall? A. I believe Tom Blondin asked.

Q. Mr. Blondin, all right, sir, and do you recall what dates you read transcripts? A. I believe it was April 6 and 7, 1982.

Q. All right, sir, and now on April 6th, before you read any transcripts, were you administered an oath, sir? A. Before the grand jury, yes.

Q. Who administered that oath? A. The foreman of the Grand Jury.

Q. All right, then did you proceed to read transcripts? A. Yes, I did.

Q. Did the grand jury ask you any questions during the reading of that transcript? A. No, they did not.

Q. On April 6th did you read the transcript or the transcripts on that day along with someone else? A. Read them with Special Agent Rich Mendrop.

Q. Richard Mendrop? A. Right.

Q. Is your name on the 6(e) disclosure list, by the way, sir? A. Yes, it is.

Q. Did you also read transcripts on April 7th? (634) A. Yes, I did.

Q. And did you read them alone on that occasion or how did you read them? A. I read them with Special Agent Jerry Shea.

Q. Is he also with the C.I.D.? A. Yes, he is.

Q. Do you know whether or not his name is on the 6(e) disclosure list? A. I believe it is, yes.

Q. Now, on that occasion, was an oath given at that time before you read the transcripts. A. Yes, it was.

Q. Would you tell us how the oath ws administered, sir, and to who? A. It was administered by the foreman to both Jerry Shea and I at the same time.

Q. So that you both took the oath? A.Yes, we did.

Q. And then you proceeded to read transcripts; is that correct? A. That's correct.

Q. Were there any questions on this occasion by the grand jury? A. No, there was not.

Q. The only thing that you and Mr. Shea did then was read transcripts? (635) A. That's correct.

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CROSS EXAMINATION
BY MR. NESLAND

(636) Q. You made reference to the April 6th transcript where it's your testimony that you and Agent Mendrop read tran-

scripts to the grand jury as opposed to the reported readings by Agent Raybin and Mendrop. That occurred right after the lunch break; isn't that correct? **[IRS Agent Gerard F. Burke]** A. I believe it started in the morning and went into the afternoon. Might have had a break in between.

Q. Let me show you the record. A. Okay.

Q. Is that the first time you appeared before the grand jury? A. Yes, it was.

Q. There was no attorney present when you came in after the lunch break with Agent Mendrop? A. I don't recall whether there was or not.

Q. You don't recall whether Mr. Blondin was there or not? A. I knew he was present, you know, I'm not sure whether he was there specifically or not. I believe he was but I can't recall specifically if he was there.

Q. You were in there for 37 minutes? A. That's correct.

(637) Q. At least according to the transcript, and during that time, you don't know whether Mr. Blondin was there some part or none of the time? A. I can't specifically recall. I was just reading the transcript.

Q. What transcripts did you read? A. I don't remember. I remember one was Dietrich but that was the day, the next day. I don't recall the name of the one we were doing. I think it might have been a female name.

Q. Do you recall Dietrich because you reviewed the grand jury remarks in preparation for your testimony or do you recall it independently? A. No, that's because of reviewing them, yes.

Q. And the transcript of the grand jury reflects that on April 7th, 1982, you and Special Agent Shea came into the grand jury at appproximately 11:21? A. That's correct.

Q. And there was no attorney present there on that occa sion, was there? A. I don't know for sure, really, to be honest.

Q. You don't recall one way or the other? A. No.

Q. Had Mr. Shea been into the grand jury prior to that? A. No, he was not.

Q. He introduced himself on that occasion, did he not? (638) A. That's correct.

Q. And on April 7 at 1:29, you and Agent Shea returned to the grand jury; is that correct? A. That's correct.

Q. And you read testimony on that occasion? A. That's correct.

Q. Was there an attorney present in the afternoon? A. I'm not sure. I remember Mr. Blondin came in at one point and, you know, we were concluding, and he said he had another transcript, that we were going to come back after lunch and read that, but to be honest, I really don't know whether he came back in or we were sitting there. I didn't even make any notice.

Q. But you have some recollection that he might have come in after you had read one transcript and said that you'll have another one to read in the afternoon? A. I don't know whether he came in or—I know he was there when we were concluding because we would have gone on. You know, somebody needed to come in and say that we were done, break for lunch and come back. I know Mr. Blondin had done that. I can't recall whether he had opened the door and come in or he was sitting there and said, We're going to break for lunch here.

Q. But you do recall that on each of those occasions you were sworn? (639) A. Definitely, on both of them.

Q. On three? A. No, on the first, April 6th, I was sworn in, and then April 7th I was sworn in. Wasn't everytime we read a transcript that we were sworn in.

Q. You came in on April 6th? A. With Rich Mendrop.

Q. In the afternoon? A. And I was sworn in at that time.

Q. You don't recall what you read, you don't recall whether the attorney was there, but you do recall you were administered an oath? A. Yes, I do.

Q. And you came in twice on April 7th, once at 11:21 and once at 1:29. Were you sworn on both those occasions? A. Weren't sworn in in the afternoon because it was a continuation.

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DIRECT EXAMINATION
BY MR. ALEXANDER

(691) *** Q. (BY MR. ALEXANDER) Direct your attention, sir, to the transcript of grand jury colloquy for April 6, 1982, the 9:08 a. m. transcript, and specifically to page 8 of the transcript. Does the transcript there indicate that there was a reading to the grand jury by Agents Raybin and Mendrop on that day, sir? **[Prosecutor Thomas Blondin]** A. Yes.

Q. And can you tell us whether or not that's correct? A. That's incorrect. Paul Raybin, as I explained to the grand jurors that day, was in London with Jake Snyder interviewing a witness, Jack Walker, so that would have been physically impossible for him to be in front of the grand jury on that day. The person that read before the grand jury that day was Jerry Burke.

Q. Jerry Burke, sir? A. Yes, along with Rich Mendrop, read the transcript of testimony taken the first grand jury in this investigation.

Q. Now, do you recall, sir, was Mr. Burke sworn by the foreman (692) before he read any transcripts? A. Yes, I believe he was sworn before he read the transcripts.

Q. Now, sir, on April 7th, is it correct that Special Agent Burke and Special Agent Shea jointly read transcripts to the grand jury? A. Yes, sir.

Q. Do you recall whether you were present on that day when they read them? A. Yes, sir. In the morning—they read two times, read two different transcripts at two different times.

Q. Were either— A. In the morning it was Mr. Shea and Mr. Burke and I was present during that reading of the transcript.

Q. Do you recall whether or not Mr. Shea and Mr. Burke were sworn in by the foreman before they read the transcripts? A. My best recollection, and I'm pretty sure on this, they were sworn in by the foreman, foreperson, before they read the transcripts.

Q. Now, sir, and I'll show you this if necessary— A. That was on the morning of April 7th, and right after they finished reading, I told the grand jury that we were finished reading this transcript and we were going to do another reading in the afternoon. Now, in the afternoon, I was not present when Mr. Burke and Mr. Shea read their transcript. However, I was present at the beginning when the grand jury was, when (693) there was a quorum, and then I closed the door and seated were the two agents and they were to read the transcript, but I was not present during the reading of that transcript.

Q. Now, have you had the opportunity to examine the transcript of the colloquy of the grand jury for September 29, 1982? A. Yes, I think what you're getting at is some of the mistakes that I pointed out to you in reviewing these transcripts. The September 29th transcript indicates that I was present along with Mr. Synder and Ms. Surbaugh during that grand jury session. I was not present in that grand jury session on September 29th and I didn't arrive in Denver until later on that night and was present on September 30th for the grand jury session when the indictment was presented to the grand jury.

Q. So insofar as if the transcript reflects you as being present on the 29th, that's an error; is that right? A. I believe that's a mistake, sir.

Q. Now, are you familiar with a gentleman by the name of Tom Waters? A. Yes, sir.

Q. Did you have any dealings with Mr. Waters or his attorneys during the course of this investigation? A. Yes, sir. It was shortly before the—right before the contempt hearing for Judge Carrigan in May of 1982. There were two sessions of that, one on April 20th and then on May 6th. Somewhere around that time, prior to that, we—myself, Mr. (694) Scharf and Richard Mendrop—went to the offices of Mr. Waters' attorney to make some arrangements for him to testify at these contempt hearings.

Q. Now, in connection or directing your attention to Mr. Waters, was he called as a witness before the grand jury? A. No, sir.

Q. Was there any particular consideration that you gave effect to in not calling him before the grand jury? A. At this time, I understood—and I'm trying to recollect who in the United States Attorney's Office—I understood that Mr. Waters was subject of an investigation being handled by the United States Attorney's Office, Chuck Torres being the Assistant Unied States Attorney, and because of that, we did not want to interfere in any way with that investigation. I checked to see if Chuck Torres would have any objection to Mr. Snyder and myself questioning Mr. Waters and there was no objection. All we were told was to make sure that the arrangements were made with Mr. Waters' attorney.

Q. And did you do that? A. Yes.

Q. Now, did you, with respect to two witnesses who appeared before the grand jury, ask one of them not to disclose his testimony outside the grand jury room and ask the other not to disclose his testimony or the proceedings except to his attorney? (695) A. Yes, you're referring to my examination of Mr. Hoff and Mr. Major, who were associated with the Thom, Novoni firm up in Seattle, Washington. I believe it was in January, I think it was January 5th or 6th, and in the introduction I told them that this was a secret proceeding, that grand jury information was

secretand they should not disclose grand jury information, and one of them asked me—I don't remember whether it was Mr. Hoff or Mr. Major—whether they could talk to their attorney about it, and I said yes.

Q. Now, you're familiar with Rule 6 of the Federal Rules of Criminal Procedure? A. Yes, sir.

Q. May I ask what caused you to ask these two witnesses to maintain the secrecy of their testimony? A. I was aware at the time of Rule 6. I had read it on a number of occasions prior to that. The specific—the specific language there that there should be no obligations, other obligations of secrecy imposed, I read that before but was just not thinking of it at the time that I was talking to or examining Mr. Hoff and Mr. Major. My recollection of it was that I was—there had been an allegation that had come to our attention through Mr. Kilpatrick's attorney that there was someone that had approached Mr. Kilpatrick and was trying to sell him grand jury information and Mr. Vardaman had advised Mr. Snyder and maybe me that this had been referred to the FBI. (696) I think I was concerned about grand jury leaks or information that may have been disclosed and I think that's the reason that I—

Q. All right. Did you advise any other witnesses to maintain secrecy? A. No, sir.

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CROSS EXAMINATION
BY MR. NESLAND

(697) Q. You testified that you are familiar with the Rule 6(e) provision that no obligation of secrecy may be imposed on any person except in accordance with Rule 6(e)? **[Prosecutor Thomas Blondin]** A. Yes, sir.

Q. Are you familiar with the U.S. Attorney's Manual at all? A. Yes, sir, parts of it.

Q. Is that available to you in the tax department? A. Certainly is.

Q. Have you had occasion to ever refer to the provisions of the United States Attorney's Manual insofar as they relate to grand jury secrecy? A. Yes, sir, I've read—I believe you're referring to Title IX.

Q. Yes, Title IX? A. Yes, I've reviewed the United States Attorney's Manual on many occasions.

Q. Are you familiar with that provision, which is 9-11.360 (698) which states that a grand jury witness cannot be obliged to keep the proceedings secret? A. Yes, I have read that portion. I don't know if that's the specific section. I know what you're referring to and I have read the United States Attorney's Manual and am familiar that that basically repeats what Rule 6(e) is.

Q. Well, it makes it even clearer, doesn't it? It simply says you can't impose secrecy obligations upon witnesses of the grand jury, which is clearer even than Rule 6, isn't it? A. Yes, it is.

Q. And are you familiar with the fact that the section immediately following 360—that is, 9-11.361—again reiterates that witnesses before a grand jury cannot be placed under secrecy obligations? A. I 'm familiar with the United States Attorney's Manual's discussion that witnesses before the grand jury should not be placed under obligations of secrecy. Now, as to that particular section that you're referring to, I don't—I don't have a specific recollection.

Q. So you wouldn't be familiar with the provision following 361, which is 9-11.362, which again repeats that no secrecy obligation can be imposed on a witness before a grand jury? A. I don't remember that specific section but if you would show me the manual, I would be able to. Maybe it would refresh my recollection and I could tell you something about it.

(699) Q. And I believe you testified that the reason that you imposed the secrecy obligations on the former attorneys for

Mr. Kilpatrick in the SEC proceedings was because you were concerned about leaks? A. I believe what I stated was that one of my concerns at the time—and I think this is what was going through my mind and my state of mind—was the allegation had been made concerning the selling of grand jury information, or the attempt, to Mr. Kilpatrick, and I believe that is what was the catalyst, if you would, for my statement to Mr. Hoff and Mr. Major, yes.

Q. All right, and I believe you testified that this was in January of 1982? A. Yes, sir.

Q. Do you recall on January 5, 1982, just prior to calling David Hoff to the grand jury, that you called Christopher Wells, SEC enforcement attorney? A. Yes, sir.

Q. And I assume you've reviewed these transcripts in the past and in preparation for this hearing, have you not? A. I have reviewed some of the transcripts. I have not reviewed Mr. Wells' transcripts so—I do remember calling him that same day before Mr. Hoff and Mr. Major.

Q. You didn't impose any secrecy obligation on Christopher Wells, did you? A. No, sir. As you know, he was an attorney for the (700) government and I didn't feel it was necessary to impose that or to tell him about it. It was a mistake to impose an obligation of secrecy on the witnesses, Hoff and Major.

Q. Have you ever done that before? A. I can't say that I have never done it before but I certainly don't remember ever doing it before in other grand juries or certainly not in the Kilpatrick grand jury.

Q. Well, why don't you give me an estimate of the number of people that you've examined before grand juries in your experience. Can you give me an estimate of those? A. Boy, it would be difficult. I would say probably over—probably over 50.

Q. And out of that— A. Maybe more.

Q. And out of that number, the only times you can recall placing any of them under secrecy obligations would have been these two attorneys who had formerly represented Mr. Kilpatrick in the SEC proceedings, is that a fair statement? A. Let me put it this way—

Q. Well, wuld you mind— A. —I had mentioned the secrecy provisions of Rule 6 to other witnesses and I do not believe I've ever imposed any obligation as to secrecy. I believe it was in the context of assuring them that the information that they provided to the grand jury would be kept in secret when they were concerned (701) about testifying, and this is probably in some of the drug cases or investigations that I have had in Florida, and if you look at the transcripts of those examinations, I may have used some loose language on it and been imprecise, but I don't recollect ever imposing obligations of secrecy on any other witness.

Q. But you do concede that— A. Oh yes.

Q. That occurred here and you told them not to disclose the grand jury testimony outside of the grand jury room? A. That's right.

Q. And it's your testimony that these are the only two out of the 50 or so that you've done that you went that far? A. Yes, sir, I believe that would be a fair statement.

Q. Do you recall that after David Hoff's testimony, that you examined Roger Cossack, C-o-s-s-a-c-k, on the same day? A. I remember coming before the grand jury and examining Hoff and Major and I remember there was—they didn't follow each other but there was some—I don't know if Hoff was first or Major was first but after one of them testified, Mr. Cossack testified.

Q. And you didn't impose any secrecy obligation on him? A. No. If I remember correctly, Mr. Cossack's purpose of being before the grand jury was merely to turn over records to the grand jury on behalf of his client, Mr. Gatliff, Howard (702) Gatliff. I don't think he offered any subsequent testimony.

Q. You did call John Pettingill the same day, did you not? A. I could have. I don't have a specific recollection of John Pettingill but do I remember John Pettingill being present to produce records that he had been subpoenaed for, yes, and if this is the same day, he was represented by Plato Cacheris. It may have been the same day, I'm not sure.

Q. And you didn't impose any secrecy obligation on him on that occasion? A. No, sir.

Q. Do you recall that you also called George L. Harman, H-a-r-m-a-n, on January 5, 1982? A. Yes, I remember. He was in the afternoon, I believe.

Q. Correct. You didn't impose any secrecy obligation on Mr. Harman on that occasion, did you? A. No, sir.

Q. Do you recall that you also called Patty Akkola, A-k-k-o-l-a, on that same day in the afternoon? A. I could have. I don't remember her being called that day, but—

Q. If the transcript reflects that you did— A. If the transcript reflects it, I probably did, yes, that day.

Q. And you didn't impose any secrecy obligations on her on January 5, 1982? (703) A. No, not that I can remember.

Q. And then you appeared again on January 7th with witnesses, did you not, which is only two days later than the appearance of Hoff and Major? A. Yes, sir.

Q. And you didn't impose any secrecy obligations on the witnesses you called on that occasion? A. No, sir, no, I don't believe I did.

Q. Was your concern that Hoff and Major were trying to sell grand jury information to Mr. Kilpatrick? Is that what you were concerned about? A. No, I would not impugn the integrity of defense counsel Hoff and Major. I found them to be very—I found them to be very honest and trustworthy and straightforward. It was not a deliberate intent to keep information from

being sold. What I said was it was my state of mind at that time, I believe, that I was concerned about this attempt to bribe a target or to extort a target with grand jury information and was not thinking of Rule 6. I think that was my concern with Mr. Hoff and Mr. Major. Yes, it was in my mind, but I wasn't concerned with them actually going and trying to sell information to any of the defendants.

Q. But you were not concerned that any of these other witnesses would create that same risk; it was simply the two attorneys? (704) A. It's hard to get back to my state of mind at that time, but if you look at it, I don't think Mr. Pettingill—if he appeared that day, it was there just to present records. Mr. Cossack was there just to present records. I did not impose any secrecy requirements or obligations on them and I was not apparently laboring under the same concerns. I did not make the same mistake with those witnesses.

Q. It kind of came and went in the same day, this concern? A. I don't know why it only was with those two witnesses but it was with only the two witnesses that my concern was.

Q. Interspersed between a witness that you didn't have that concern with? A. Mr. Roger Cossack, who presented records, yes.

Q. And it was only in the morning because in the afternoon when you had the witnesses, you no longer had that concern, so it's really about an hour broken by a 20-minute interval and then another hour and then that concern evaporates for the remainder of the investigation; is that your testimony? A. I don't know if that's a correct or proper characterization, it evaporates. I don't know if it evaporated or it was still there but—I mean, it had been a concern that there would have been someone that was trying to sell information. I didn't know if they had grand jury information or not, but it was a concern. In fact, it was so much of a concern that Jake Snyder and I referred it to the office of professional

(705) responsibility to take whatever steps that they felt they should to investigate the matter.

Q. When did you learn about this so-called leak or this so-called problem, this overriding concern? A. I believe it was in the beginning of November of 1981 we heard about it, and then in I guess the middle of November, there was more information. We didn't have that much information as to what actually occurred, but we received even more information and were told that the FBI—it had been referred or the FBI was conducting their investigation, and then I think at that time, in the middle of November, we also referred it to the office of professional responsibility.

Q. When did you refer it? A. I believe it was in the middle of November of 1981.

Q. Now, you were also out here in the February grand jury which was the following month, were you not? A. February 2nd, yes, sir.

Q. Did you conduct any examination on those occasions? A. I remember being present. I think the first witness that morning was Richard Birchall, February 2nd. His examination, a very short one, was conducted by Mr. Snyder. If you would refresh my recollection with the transcripts—I don't remember any other witnesses.

Q. There were a number of witnesses in February, Richard Birchall, Howard Gatliff— (706) A. Okay, Howard Gatliff I did examine.

Q. You did? A. Yes, I believe I did.

Q. Did you have a concern then or not about this leak? A. Oh, I'm sure I had a concern about the allegation.

Q. But not enough to impose secrecy obligations on Mr. Gatliff? A. I did not impose any secrecy obligations on Mr. Gatliff.

Q. In fact, you didn't do any other witness other than the two that we're talking about in this investigation? A. That's true.

Q. Did you examine any of the agents in this investigation? A. I think I—on one or two occasions I examined either Mr. Raybin or Mr. Mendrop or both, on separate occasions before the grand jury. I don't remember specifically when it was. It was a very limited number of—just for a question that the grand jury had or to provide a summary of certain documents that had been received by the grand jury.

Q. So you have some recollection that you examined Agent Mendrop on at least one occasion? A. Yes.

Q. And Agent Raybin on at least one occasion? A. Well, it may have been Mr. Mendrop on two occasions or—

Q. Okay. A. I don't have a specific recollection but I do remember examining Mendrop and maybe Raybin. I would have to refer to (707) the transcript.

Q. Any other agents that you can recall that you examined in the grand jury? A. The only other agent that probably I could have examined would have been a Roger Schneider but I don't think I did.

Q. You never conducted an examination of Special Agent Burke? A. No.

Q. Never conducted an examination of Special Agent Shea? A. No, sir.

Q. Now, you've reviewed the transcripts on April 6th and April 7th, 1982, have you not, in preparation for this? A. Yes, I've read those transcripts.

Q. Did you introduce Agent Burke to the grand jury on April 6th? Do you have a recollection of doing that? A. I do not have a recollection of actually introducing him to the grand jury on April 6th. I don't have a recollection of that.

Q. And you didn't ask him to introduce himself; that is, you didn't ask him to give his name and his occupation to the grand jury, did you, in April 6th? A. No, I did not.

Q. Were you present when he commenced reading with Agent— A. —Mendrop?

Q. Yes. A. I don't have a specific recollection of that grand jury (708) session. I probably would have been present at the beginning when they read the transcripts but I don't have a specific recollection of it, no.

Q. Well, let me ask you this. Based on your custom and practice, if you were in the grand jury room when the agents came in, wouldn't it have been your practice to identify the agents to the grand jury and explain what they were there for? A. Well, not necessarily, because Mr. Mendrop and Mr. Raybin had been before that grand jury and reading transcripts on a number of occasions prior to April 6, 1982. The grand jury were, those grand jurors were well aware of whom Mr. Mendrop and Mr. Raybin were.

Q. They didn't know who Mr. Burke was though, did they? A. At that time, that would have been Mr. Burke's first appearance before the grand jury.

Q. And wouldn't it have been your custom and practice to introduce agents who are assisting you in the investigation to introduce them to the grand jury? A. I would have probably introduced Mr. Burke as a special agent who would be reading transcripts with Mr. Mendrop.

Q. All right. So when you testified in response to Mr. Alexander's questions that you believe he was sworn on that occasion, you weren't even in the room, to the best of your recollection? A. All right, now, there may be two different occasions we're (709) talking about. I believe I testified that on April 7th—

Q. You testified on April 6th you believed he was sworn. You want to correct that testimony and say that you believe it was on April 7th? A. Well, I remember—I have a recollection of April 7th for sure, and I believe that he was sworn on April 6th, but I don't have a specific recollection of the April 6th reading.

Q. From your best recollection you're not even sure you were there when he— A. Like I said, I don't have a specific recollection of being present but I would have probably been there because, as you pointed out, it would have been my practice.

Q. So the probabilities were you weren't there because he was not introduced to the grand jury on April 6th before he commenced reading transcripts? A. I haven't stated that he was not introduced to the grand jury.

Q. I'm asking you if— A. I don't have a specific recollection of him being introduced to the grand jury but he probably would have been because I would have made a comment that, This is Special Agent Burke who will be reading transcripts with Mr. Mendrop. Now, whether or not that was picked up in the transcript, that's another matter.

Q. All right. So the transcript may be incorrect? (710) A. It may be very well incorrect.

Q. And on the morning of April 7th, do you have a recollection of introducing Agent Burke to the grand jury and identifying what they were going to do? A. Excuse me, sir. If I may be permitted to respond to that, to just add something on that last question, normally when we started off the grand jury investigation, the reporter would—or I mean a session—the reporter would say, Are you ready to go? And I would say, Yes, let's go. If there was any confusion and I had said, This is Special Agent Burke and Special Agent Burke and Mr. Mendrop are reading the transcripts and that wasn't picked up on the transcripts because the reporter wasn't going, I don't know, but in response to your question, it was my practice to introduce new special agents and, in all probability, I did, but I don't have a specific recollection of it.

Q. But you have a recollection of being there on the morning of April 7th? A. Yes, because Mr. Burke and Mr. Shea were both new to the grand jury in the sense that they were not Mr. Raybin and Mr. Mendrop, who had appeared a number of times, and I read the colloquy where after they testified I told the

grand jurors, we're finished with one and we'll read the next one later in the day, and I also have a recollection that that was the first time that I had heard that transcript that they were reading.

(711) Q. What do you mean it was the first time? A. Well, because it was part of the first grand jury which I was not part of.

Q. Well, I assume that everytime they read a transcript it was the first time somebody had heard it? A. No, because there were—I didn't read all of the grand jury transcripts from the first grand jury. I read selected ones, and this particular one I didn't. It's my recollection I had not read it and was hearing it for the first time of Mr. Snyder examining the witness.

Q. And you have a specific recollection of the foreman or deputy foreman administering an oath to them on that morning? A. It is my recollection that they were administered oaths prior to starting, yes, that morning.

Q. You have a specific recollection? You recall a deputy foreman or the forelady sitting there and swearing them in? A. I don't have a visual recollection of that but it is my recollection that they were sworn in, yes.

Q. And then you weren't there in the afternoon, as I understand it. A. That's correct, sir, I was not present during the reading of the grand jury transcripts in the afternoon.

Q. On that occasion, they just came in there by themselves and started reading? A. I believe I was there right when the grand jury was getting (712) settled and two agents were seated and I closed the door when they started, when they were to start their reading.

Q. What you're saying is the two agents came in and you left? A. They may have come in at the same time with me. I know that I was not present during the reading, but I think I was there right at the beginning because it's my practice to, when the grand jury came back from lunch, to be there with them, you know, and at least two agents would have been reading the tran-

script, but I did not stay and I don't remember their being sworn in at that time. I don't have a recollection of them reading transcripts.

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(739) *** Q. So you could have called him to the grand jury to testify? A. Yes, yes, we could have called Tom Waters. We did not call him to testify. Well, let me backtrack here. I remember there was a problem about having him testify before the grand jury. I believe that he was under investigation at that time and we could only go into certain limited questions, and his counsel may have refused to allow him to appear before the grand jury, I'm not certain on that. I don't know what was the reason. I know he did not testify before the grand jury, but I'd have to look at some notes or try to reconstruct it to determine why he did not go before the grand jury. There may have been a reason.

Q. Have you ever read a summary of any interview of Tom Waters? A. I believe I have, yes.

Q. And do you know who prepared that summary? I'm not asking who typed it. A. I would imagine—okay, there was a —I believe we may have prepared a summary of the interview and it would have been either—well, after indictment, sometime in the early part of '83, there was a meeting between Tom Waters, his attorney, myself, Jared Scharf and Rich Mendrop. This is after the (740) indictment.

Q. I'm asking you— A. Now, that was either prepared and typed up by myself, Mr. Scharf or Mr. Mendrop.

Q. What I'm asking for is was there ever a summary of what Mr. Waters had said in 1982 about meeting the president of the Bank of Nova Scotia at Mr. Kilpatrick's office? Do you ever recall seeing anything like that? A. If I could see some documents, I probably would remember it if it occurred, but as I told you, I don't—I think he was interviewed prior—I'm sure he was because we wouldn't have put on a cold witness at the contempt hearing,

but I don't have a specific recollection of it now so I wouldn't have a recollection of any memos or memorandum of interview.

Q. Do you recall during the course of the investigation that anybody interviewed Mr. Waters and learned from him that according to him he had met the president of the Bank of Nova Scotia at Mr. Kilpatrick's office? A. I had to have known—

MR. ALEXANDER: Objection, Your Honor, as to the relevancy in this proceeding as to what Mr. Waters did or didn't do in connection with the facts of the case.

MR. NESLAND: It has to do with the summary of Agent Mendrop in which he simply states that Tom Waters met the president of the Bank of Nova Scotia. He attributes it to (741) nobody, he doesn't identify where it came from, doesn't identify if it's hearsay, doesn't identify if the grand jury has heard testimony from Tom Waters, and if there is any other reasons necessary, Mr. Alexander, I can make them up.

MR. ALEXANDER: I would like to hear them instead of facetious remarks from counsel.

THE COURT: Well, let's not be too facetious. The objection is overruled. Go ahead.

THE WITNESS: Could you repeat that question?

(The last question was read back by the reporter.)

THE WITNESS: I had to have known that prior to putting Mr. Waters on the stand in the contempt hearing.

Q. (BY MR. NESLAND) But you did not participate in any interview of Mr. Waters by which you can recall learning that? A. I don't recall the interview that you're talking about and I must—I don't think I participated in any interview, or the interview that you're referring to, if the happened, but I must have, as I do with most of the witnesses unless they're just totally just documentary witnesses, must have had a pre-contempt hearing interview with Mr. Waters, maybe a short briefing, maybe it was the

same day of his testimony, but it would have been prior to his testimony at the contempt hearing.

Q. So what you're saying is you would have had some briefing period and— A. I would have.

(742) Q. —because you put Mr. Waters on the stand, you were responsible for his examination? A. Yes, I examined him on the stand, if I remember correctly.

Q. And he testified with respect to that issue; that is, that he testified that he recalled that he had met the president of the Bank of Nova Scotia? A. In substance, yes, he said that he was introduced to a person by Mr. Kilpatrick as being the president of the Bank of Nova Scotia.

Q. Did you show Mr. Waters any photographs to determine whether or not the person that he had met on that occasion was the president of the Bank of Nova Scotia? A. No, I didn't. I remember him describing that person, though. I think this is bringing it back. I think I have read a memorandum where Mr. Waters describes the person who he met, was introduced as the Bank of Nova Scotia's president, as wearing funny clothes, sort of outlandishly dressed, and with shoes that had tassels on them or something like that. I believe that's in a memorandum and I've read that memorandum before and I don't remember where—what particular interview that is referring to, it referred to.

Q. Do you know whether, during the course of the investigation, there was any investigation made to determine whether or not the person described by Mr. Waters reasonably compared to the president of the Bank of Nova Scotia or the purported president, (743) Monty Smith, who was being referred to? A. In fact, that was one of the things that we looked into because I believe there was a discrepancy as to his description of this person that he had been introduced to as the Bank of Nova Scotia's president and a photo that was in some Cayman journal, business journal,

of Monty—let's see, I think it was Monty Smith—there was a picture in it.

Q. They didn't appear to be the same people? A. There was a real question as to whether or not it was the same person.

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CROSS EXAMINATION
BY MR. WALLER

(802) *** Q. How many grand jury investigations have you conducted or assisted in conducting? **[Prosecutor Thomas Blondin]** A. Prior to the Kilpatrick grand jury investigation?

Q. Yes. A. One.

Q. And how many since the Kilpatrick grand jury investigation? A. Let me expand upon my answer on one—I've presented a number of cases to grand jury for indictment in our normal case with cases authorized for prosecution and you bring in a special agent to present the case and you may call a witness, like an accountant or one of the employees, but it's not a full-blown grand jury investigation. Normally, prior to the Kilpatrick, I was involved in one, what I would consider, grand jury investigation, but I presented a number of cases before the grand jury. Subsequent to that and during the Kilpatrick investigation, I was involved in a number of grand jury investigations; probably, I don't know, more than ten, I guess.

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RE-DIRECT EXAMINATION
BY MR. ALEXANDER

(1067) *** Q. Now, sir, with regard to the presence or not of Mr. Monty Smith in Denver, do you recall testifying about that incident, with regard to June of '79, that Mr. Waters met Mr. Smith in Denver? Is my recollection correct on that?

[Prosecutor Thomas Blondin] A. Yes, I believe it was cross-examination by Mr. Nesland. He was asking about Mr. Monty Smith being present in Denver, Colorado in June of 1979.

Q. And you testified at one point in time that there was a question as to the identity, a real question, I believe you said, as to the identity of Monty Smith, did you not? A. Yes.

Q. Now, with relationship—strike that. When was the indictment returned in this case? A. September 30, 1982.

Q. Now, using the indictment as a point of time or reference point, when did the question arise in your mind from a time standpoint before the indictment or after the indictment as to whether or not there was a question as to the identity of Monty Smith? A. Several months prior to the indictment.

Q. And then what, if anything, did you do or direct the agents to do in connection with this question that you had, sir? A. I directed Paul Raybin and Rich Mendrop to assemble all (1068) information concerning this incident and to do further investigation to corroborate Mr. Waters' statement that he met Monty Smith in Denver, Colorado in June of 1979.

Q. And what did they do, sir, do you recall? A. They did assemble the information that we had in our files and I believe it was Rich Mendrop contacted Tom Waters and conducted an interview. This would have been on about September 15, I believe, 1982, and Paul Raybin also contacted a Raul Ros and obtained information concerning this event.

Q. Was this incidentally the second interview of Mr. Waters? A. Yes, the first interview of Mr. Waters was a telephone interview by Mr. Mendrop in February of 1982.

Q. All right, sir, and then subsequently there was a further interview? A. There was, yes. This was the second or third interview of Mr. Waters.

* * * * * *

CROSS EXAMINATION
BY MR. RUTNER

(1122) **[Prosecutor Scharf]** THE WITNESS: Your Honor, I remember the third reason, in response to Mr. Nesland's question, as to why I didn't believe there was a *Massiah* violation.

THE COURT: Okay, go ahead.

THE WITNESS: Because *Massiah* says it's not a violation. Even if I had interviewed indicted defendants, according to *Massiah* and the cases that follow it, that's not a violation. *Massiah* and those cases only hold that you cannot use that statement againt the defendant, but they do not state that it's misconduct or error and no indictment has ever been dismissed because of it, and in the Tenth Circuit you're permitted to use such statements to impeach a defendant's testimony, and I'm referring to the *McManaman*, M-c-M-a-n- a-m-a-n, case.

* * * * * *

(1137) *** Q. Mr. Scharf, with your knowledge, limited as it may be as to what's gone on during these proceedings in the last five months, is it still your opinion that the matters being printed here are silly and frivolous? A. Absolutely. I don't think you've proved one thing. I think you've proved two things and that is that—

Q. Thank you, Mr. Scharf. A. —those charges are silly and frivolous. If they were proved they wouldn't be silly and frivolous, but you haven't proved one thing.

Q. Thank you.

* * * * * *

(1175) *** THE COURT: That's all right, I'm not picky about that, but as I recall the testimony of the I.R.S. special agents, they have emphatically denied turning over grand jury material to the civil branch and I haven't seen any evidence yet

that says that that indeed was done. I've heard a lot of denials. Now are you laying a foundation for this, is that what you're trying to do?

* * * * * *

AS INDICATED ON THE DOCKET, VOLUME II OF THE JOINT APPENDIX WAS SEALED BY THE COURT AND CONSEQUENTLY IS NOT AVAILABLE FOR MICROFILMING

No. 87-602-CFY
Status: GRANTED

Title: William A. Kilpatrick, et al., Petitioners
v.
United States

Docketed:
October 13, 1987

Court: United States Court of Appeals
for the Tenth Circuit

Vide:
87-578

Counsel for petitioner: Cohan,William A.

Counsel for respondent: Solicitor General

Entry	Date	Note	Proceedings and Orders
1	Oct 13 1987	G	Petition for writ of certiorari filed.
3	Nov 10 1987		Order extending time to file response to petition until December 14, 1987.
4	Dec 14 1987	X	Brief of respondent United States in opposition filed. VIDED.
5	Dec 16 1987		DISTRIBUTED. January 8, 1988
6	Jan 11 1988		Petition GRANTED. limited to Question 1 presented by the petition. The case is consolidated with 87-578, and a total of one hour is allotted for oral argument.
			**********
7	Feb 22 1988		Brief of petitioner William A. Kilpatrick filed.
9	Feb 25 1988		Brief amicus curiae of Natl. Assn. of Criminal Defense Lawyers filed. VIDED.
12	Feb 25 1988		Joint appendix filed. VIDED.
13	Feb 25 1988		Brief amici curiae of ACLU, et al. filed. VIDED.
10	Feb 26 1988	G	Motion of petitioners for leave to file portion of joint appendix under seal filed.
8	Feb 27 1988		Record filed.
		*	Certified copy original record and proceedings - 3 boxes- Box 1 rec'd 2-26-88. Box 2 & 3 re'd 2-27. (Sealed).
11	Feb 29 1988		DISTRIBUTED. March 4, 1988. (Above motion to file portion of joint appendix under seal).
14	Mar 7 1988		Motion of petitioners for leave to file portion of joint appendix under seal GRANTED.
15	Mar 10 1988	D	Motion of petitioners for divided argument filed.
17	Mar 11 1988		SET FOR ARGUMENT, Wednesday, April 27, 1988. (1st case). This case is consolidated with 87-578. 1 hour.
16	Mar 21 1988		Motion of petitioners for divided argument DENIED.
18	Mar 28 1988		Brief of respondent United States filed. VIDED.
19	Mar 31 1988		CIRCULATED.
20	Apr 19 1988	X	Reply brief of petitioner William A. Kilpatrick filed.
21	Apr 27 1988		ARGUED.

Supreme Court, U.S.
FILED
FEB 22 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-602

In The
Supreme Court of the United States
October Term, 1987

WILLIAM A. KILPATRICK, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF PETITIONERS

WILLIAM A. COHAN*
JENNIFER A. GREENE
COHAN & GREENE
1801 York Street
Denver, Colorado 80206
(303) 321-0999

Attorneys for Petitioners
William A. Kilpatrick
Declan J. O'Donnell and
Sheila C. Lerner

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

QUESTION FOR REVIEW

Whether a federal court may dismiss an indictment before trial based upon its supervisory powers without a finding of prejudice to the defendant in order to protect the integrity of the judicial system.

PARTIES

The following parties were involved in the lower court decision:

WILLIAM A. KILPATRICK
DECLAN J. O'DONNELL
SHEILA C. LERNER
THE BANK OF NOVA SCOTIA
MICHAEL ALBERGA
C.S. GILL
UNITED STATES OF AMERICA

TABLE OF CONTENTS

	Page
QUESTION FOR REVIEW	i
PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED	2
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	5
ARGUMENT	7
Pre-trial dismissal of an indictment by a federal court exercising supervisory power does not require proof of prejudice	
A. The Imperative of Judicial Integrity	7
B. Pre-trial Review Renders Harmless Error Analysis Inappropriate	16
C. Prosecutorial Misconduct Was Not "Harmless" Beyond A Reasonable Doubt	26
I. Mistreatment of the Tax Law Expert Witness	26
II. Violation of F.R.Crim.P. 6(d)	29
III. Violations of F.R.Crim.P. 6(e)	30
(a) Disclosure	31
(b) Improper Use	34
(c) Secrecy Violations	36

TABLE OF CONTENTS—Continued

		Page
	(d) Improper Imposition of Secrecy Violations	37
IV.	Use of Pocket Immunity	39
V.	Violations of the Sixth Amendment	41
VI.	"Summaries of the Evidence" by Self-Proclaimed Agents of the Grand Jury	41
CONCLUSION		45
APPENDIX A		App. 1

TABLE OF AUTHORITIES

	Page
CASES:	
Ballard v. United States, 329 U.S. 187 (1946)	16
Berger v. United States, 295 U.S. 78 (1935)	9
Brewer v. Williams, 430 U.S. 387 (1977)	41
Brinegar v. United States, 338 U.S. 160 (1949)	9
Bruno v. Rushen, 721 F.2d 1193 (9th Cir. 1983)	28
Chapman v. California, 386 U.S. 18 (1967)	9, 28
Dennis v. United States, 384 U.S. 855 (1966)	11
Elkins v. United States, 364 U.S. 206 (1960)	9
Francis v. Franklin, 471 U.S. 307 (1985)	46
Gerstein v. Pugh, 420 U.S. 103 (1975)	9
Griffin v. California, 380 U.S. 609 (1965)	24
Holloway v. Arkansas, 435 U.S. 475 (1978)	17, 21
Kolender v. Lawson, 461 U.S. 352 (1983)	45
Krulewitch v. United States, 336 U.S. 440 (1949)	11
Massiah v. United States, 377 U.S. 201 (1964)	15, 41
Miranda v. Arizona, 384 U.S. 436 (1966)	9
McNabb v. United States, 318 U.S. 332 (1943)	9, 17
N.A.A.C.P. v. Claiborne Hardware, 458 U.S. 886 (1982)	46
Olmstead v. United States, 277 U.S. 438 (1928)	8
Rea v. United States, 350 U.S. 214 (1956)	9
Rose v. Clark, — U.S. —, 106 S.Ct. 3101 (1986)	46
Stone v. Powell, 428 U.S. 465 (1976)	9
Taylor v. Louisiana, 419 U.S. 522 (1975)	16
Tennessee Valley Authority v. Hill, 437 U.S. 153 (1978)	16

TABLE OF AUTHORITIES—Continued

Page

United States v. Anzalone, 766 F.2d 676 (1st Cir. 1985) 13, 45

United States v. Baggot, 463 U.S. 476 (1983) 9, 32

United States v. Basurto, 497 F.2d 781 (9th Cir. 1974) 11, 28

United States v. Ciambrone, 601 F.2d 616 (2d Cir. 1979) 28, 29

United States v. Critzer, 498 F.2d 1160 (4th Cir. 1974) 28

United States v. Dahlstrom, 713 F.2d 1423 (9th Cir. 1983) 12, 28, 45

United States v. De Rosa, 783 F.2d 1401 (9th Cir. 1986) 11

United States v. Denemark, 779 F.2d 1559 (11th Cir. 1986) 13

United States v. Estepa, 471 F.2d 1132 (2d Cir. 1972) 11, 19, 28

United States v. Garber, 607 F.2d 92 (5th Cir. 1979) 28

United States v. Gimbel, 830 F.2d 621 (7th Cir. 1987) 13

United States v. Hasting, 461 U.S. 499 (1983) ..... *passim*

United States v. Hogan, 712 F.2d 757 (2d Cir. 1983) 11, 28, 46

United States v. Kilpatrick, 575 F. Supp. 325 (D. Colo. 1983) 3

United States v. Kilpatrick, 594 F. Supp. 1324 (D. Colo. 1984) 3

United States v. Larson, 796 F.2d 244 (8th Cir. 1986) 13

TABLE OF AUTHORITIES—Continued

Page

United States v. Mechanik, 475 U.S. 66 (1986) ..... *passim*

United States v. Murphy, 809 F.2d 1427 (9th Cir. 1987) 13

United States v. Payner, 447 U.S. 727 (1980) 9

United States v. Reinis, 794 F.2d 506 (9th Cir. 1986) 13

United States v. Roberts, 481 F. Supp. 1385 (C.D. Cal. 1980) 46

United States v. Samango, 607 F.2d 877 (9th Cir. 1979) 11, 28, 46

United States v. Sells Engineering, Inc., 463 U.S. 418 (1983) 8, 9, 32, 33, 35

United States v. Serubo, 604 F.2d 807 (3d Cir. 1979) 11, 28

United States v. Varbel, 780 F.2d 758 (9th Cir. 1986) 13

Vasquez v. Hillery, 474 U.S. 254 (1986) 8, 16, 28

Young v. United States ex rel. Vuitton et Fils S.A., — U.S. —, 107 S.Ct. 2124 (1987) 8, 10, 17

STATUTES:

18 U.S.C. § 371 11

18 U.S.C. § 1503 ..... 2, 7, 14

18 U.S.C. § 6001 *et seq.* 39, 40

18 U.S.C. § 6002 ..... 2, 40

18 U.S.C. § 6003 ..... 2, 40

RULES:

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 6(d) 2, 7, 24, 29, 30

Rule 6(e) ..... *passim*

TABLE OF AUTHORITIES—Continued

Page

OTHER AUTHORITIES:

UNITED STATES CONSTITUTION

First Amendment 45
Fifth Amendment 7, 21, 39, 45
Sixth Amendment 2, 7, 15, 41
United States Attorneys' Manual § 9-11.362 38

No. 87-602

In The
Supreme Court of the United States
October Term, 1987

WILLIAM A. KILPATRICK, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF PETITIONERS

OPINIONS BELOW

(1) *United States v. Kilpatrick*, 575 F.Supp. 325 (D. Colo. 1983) (per Winner, J.).

(2) *United States v. Kilpatrick*, 594 F.Supp. 1324 (D. Colo. 1984) (per Kane, J.).

(3) *United States v. Kilpatrick*, 821 F.2d 1456 (10th Cir. 1987) (per Holloway, J. and Bohanon, J., with a dissenting opinion by Seymour, J.).

JURISDICTION

The opinion of the court of appeals was filed on June 18, 1987. A timely filed Petition for Rehearing and Suggestion for Rehearing En Banc was denied on August 19, 1987. A timely filed Petition for Writ of Certiorari was granted, limited to Question 1 presented by petitioners, on January 11, 1988, and this Brief submitted by petitioners on the merits is timely filed. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

———o———

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

This case involves the Grand Jury and Due Process clauses of the Fifth Amendment to the United States Constitution, 18 U.S.C. §§ 6002 and 6003, Rules 6(d) and (e) of the Federal Rules of Criminal Procedure, which collectively constituted Appendix F of Petitioners' Petition for Writ of Certiorari, and the Sixth Amendment to the United States Constitution and 18 U.S.C. § 1503, which collectively constitute Appendix A of this Brief.

———o———

STATEMENT OF THE CASE

On September 24, 1984, the United States District Court for the District of Colorado, the Honorable John L. Kane, Jr., dismissed a twenty-seven count indictment charging seven individuals and the Bank of Nova Scotia

with conspiracy, mail fraud and tax fraud.[1] Unprecedented, deliberate and pervasive governmental misconduct requiring dismissal was painstakingly documented in two exhaustive district court opinions. *United States v. Kilpatrick*, 575 F.Supp. 325 (D. Colo. 1983; per Winner, J.); *United States v. Kilpatrick*, 594 F.Supp. 1324 (D. Colo. 1984; per Kane, J.). By a divided vote and in spite of a vigorous dissent, the United States Court of Appeals for the Tenth Circuit reversed the trial court and reinstated the indictment. In so doing the majority purportedly employed a "harmless error" test to excuse indisputably egregious and extensive governmental misconduct. "Harmless error" analysis requires that the reviewing court determine the cumulative effect of the misconduct was harmless beyond a reasonable doubt. The majority never did so, however, erring in two respects: (1) it required the defendants to demonstrate prejudice by repeatedly citing their failure to do so as grounds for reversal, instead of requiring the government to bear the burden of establishing that the misconduct was harmless, and (2) it failed to impose the standard of "harmless beyond a reasonable doubt" on the misconduct identified.

Accordingly, this case presents the Court with the opportunity to resolve crucial and recurring questions concerning the exercise of supervisory powers to deter governmental misconduct when such illegal activity is dis-

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[1] While several defendants were charged, this Brief is submitted on behalf of Defendant-Petitioners Kilpatrick, O'Donnell, and Lerner.

covered prior to trial. National media,[2] congressional hearings[3] and legal commentary[4] have focused public attention on the integrity of the criminal justice system, which has been seriously impugned by the government's outrageous and unlawful activities, compounded further by the unwarranted amnesty extended by the majority.

The district court dismissed the indictment prior to trial based on its supervisory power, utilizing the balancing test mandated by *United States v. Hasting*, 461 U.S. 499 (1983) and adumbrated in *United States v. Mechanik*, 475 U.S. 66 (1986). Judge Kane determined that some of the violations, standing alone, required dismissal, while others, not singularly requiring dismissal, when considered cumulatively amounted to a travesty. In concluding

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2 *E.g. 60 Minutes: U.S. vs. Kilpatrick* (CBS Television Broadcast, Jan. 13, 1985; Aug. 4, 1985); N.Y. Times, Jan. 22, 1984, at 1, col. 1; Washington Post, Jan. 25, 1984, at A2; National Law Journal, Jan. 30, 1984, at 1, col. 1; Legal Times, Feb. 6, 1984, at 1.

3 *See Oversight of IRS and Justice Department Prosecution of Several Tax Cases: Hearing Before the Subcomm. on Oversight of the Internal Revenue Service of the Senate Comm. on Finance*, 99th Cong., 2d Sess. 2, 311, 353 (Part 1 June 19-20, 1986) (statements of Senator William L. Armstrong; David Russell, President, National Association of Criminal Defense Lawyers; Peter F. Vaira, Partner, Lord, Bissell & Brook, and Vice Chairman, Grand Jury Committee, American Bar Association).

4 *See, e.g.*, J. Lawless, *Prosecutorial Misconduct*, §§ 2.11, 2.15, 2.16, 2.19, 10.3 (1985); 2 S. Beale & W. Bryson, *Grand Jury Law and Practice*, §§ 7:05, 10:02, 10:12, 10:22 (1987); Grand Jury Project, Inc., *Representation of Witnesses Before Federal Grand Juries*, §§ 11.2, 12.5, 13.4 (3d ed. 1985); T. Engel & D. Parker, *Release of Grand Jury Materials Under Rule 6(e) of the Federal Rules of Criminal Procedure*, 255, 267 (in *White Collar Criminal Practice 1985*, Litigation and Administrative Practice Series, Criminal Law and Urban Problems, Course Handbook Series No. 137 (PLI) (1985)).

that dismissal was compelled, the trial judge noted that even after the litany of lawlessness had been spread on the record, the government persisted in characterizing the criticism of the misconduct as "silly" and "frivolous." Dismissal of the indictment based on supervisory authority was deemed necessary to declare that such conduct was neither "silly" nor "frivolous," that it will not be tolerated, that it yielded an IRS investigation which was out of control and a grand jury which was little more than a rubber stamp: public confidence in the integrity of the criminal justice system requires no less.

—o—

SUMMARY OF ARGUMENT

The integrity of the criminal justice system is essential to the trust and esteem of the public, without which the system cannot continue to function. The supervisory powers doctrine is designed to safeguard the integrity of the criminal justice system from overzealous law enforcement. The focus under the supervisory powers analysis is on the harm to the system. This focus differs from due process or harmless error analysis which focus on whether the decision-maker's deliberations have been affected by the misconduct at issue. Only through the exercise of supervisory powers can the courts directly protect the system by removing the incentive to disregard the system's limitations on the powers of government. Neither the purpose behind the doctrine nor the analysis used thereunder require a showing of prejudice to the defendant.

Since harmless error analysis more narrowly concerns the interest of a particular appellant, not those of society in general, it focuses on the outcome of the controversy under review and the effect of the decision-maker's conduct on the verdict. It is appropriately applied in reviewing trial proceedings, where the error can be easily identified, traced and measured. The policies behind this type of analysis require a balancing of the costs involved in reversing a conviction against the quantity and quality of the error(s). Where there has been no trial and no conviction, harmless error analysis is inappropriate. Even assuming the errors can be quantified, the principal reason for harmless error analysis is to avoid reversing convictions because of the expense and difficulty of re-trial, the burden on witnesses, and the impression that convicts are able to flaunt the law: none of these factors are present when dismissal occurs prior to trial. Furthermore, in attempting to assess prejudice, the reviewing court may be compelled to engage in unguided speculation.

The Tenth Circuit's decision to reverse the pre-trial dismissal of petitioners' indictment inappropriately applies a harmless error analysis to the proceedings before the grand jury, finding defendants failed to show prejudice to the grand jury's independence. Furthermore, the harmless error analysis applied was faulty in itself, in that the court (1) required the defendants to prove prejudice, rather than requiring the government to prove its absence; (2) failed to determine whether the misconduct constituted harmless error beyond a reasonable doubt; and (3) mischaracterized dismissal of the indictment as a drastic remedy (thereby affording it too much weight),

when upholding the trial court's decision would mean simply that the government would have to obtain an untainted indictment.

The majority's superficial treatment of the facts yielded a finding of no prejudice, despite detailed and documented findings to the contrary by two district court judges and one dissenting appellate judge, who characterized the misconduct as patently prejudicial and egregious. The exhaustive factual findings of the district court display a laundry list of procedural irregularities and deceptive practices in violation of Fed.R.Crim.P. 6(d) and (e), the Fifth and Sixth Amendments, the immunity statutes, 18 U.S.C. § 1503, i.e. witness intimidation and more.

———o———

ARGUMENT

PRE-TRIAL DISMISSAL OF AN INDICTMENT BY A FEDERAL COURT EXERCISING SUPERVISORY POWER DOES NOT REQUIRE PROOF OF PREJUDICE

A. THE IMPERATIVE OF JUDICIAL INTEGRITY

Justice Brandeis articulated the *raison d'etre* for the supervisory power of the federal courts in an eloquent and oft-quoted dissent:

> In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto him-

> self; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face.

Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J. dissenting).

The case at bar concerns an indictment procured by government misconduct, which was concisely characterized by Circuit Judge Seymour in her dissent:

> It is beyond argument that the Government's conduct in this case was outrageous. As set out in two district court opinions, *United States v. Kilpatrick*, 594 F.Supp. 1324 [per Kane, J.] (D. Colo. 1984), and *United States v. Kilpatrick*, 575 F.Supp. 325 [per Winner, J.] (D. Colo. 1983), the record contains evidence constituting a laundry list of serious improprieties, most of which the majority neither disputes nor condones. [Kilpatrick Petition for Writ of Certiorari Appendix, (hereinafter "KA") 40a].

Over the last 50 years this Court has repeatedly invoked its supervisory power over the administration of criminal justice in the federal courts to protect the integrity of the court, rather than to vindicate the rights of particular defendants.[5]

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[5] *Young v. U.S. ex rel. Vuitton et Fils S.A.*, — U.S. —, 107 S.Ct. 2124, 2138 (1987) (exercise of supervisory powers is appropriate to determine procedures to be employed by courts in matters that directly concern function of judiciary); *Vasquez v. Hillery*, 474 U.S. 254 (1986) (serves to deter undermining the structural integrity of the grand jury system); *United States v.*

(Continued on following page)

Exercise of supervisory power is designed to compel respect for and obedience to constitutional and statutory rights and limitations on the powers of the government by removing the incentives to disregard them: in the instant case, dismissing the indictment serves to deter those who would employ lawless methods to obtain an indictment. *Elkins v. United States*, 364 U.S. 206, 217 (1960). Courts can protect the innocent against government misconduct by exercising supervisory powers to exclude evidence and dismiss indictments, even though the immediate beneficiaries of the courts' rulings frequently are guilty. *Brinegar v. United States*, 338 U.S. 160, 181 (1949) (Jackson, J., dissenting). This Court and countless lower courts have excoriated conduct that diminishes faith in the fairness of the criminal justice system in general. The narrow

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(Continued from previous page)

Sells Engineering, Inc., 463 U.S. 418 (1983) and *United States v. Baggot*, 463 U.S. 476 (1983) (serves to deter threat to integrity of grand jury by disclosure for civil purposes); *United States v. Payner*, 447 U.S. 727 (1980) (serves to deter illegality and protect judicial integrity); *Stone v. Powell*, 428 U.S. 465 (1976) (constitutional obligation on courts to exercise supervisory powers serves to safeguard personal liberties and to uphold federal law); *Gerstein v. Pugh*, 420 U.S. 103 (1975) (serves to require procedures which safeguard against significant pretrial restraint of liberty); *Chapman v. California*, 386 U.S. 18 (1967) (serves to formulate authoritative laws, rules and remedies designed to protect against infractions by states of federally guaranteed rights); *Miranda v. Arizona*, 384 U.S. 436 (1966) (serves to formulate procedures to protect individual rights and integrity of criminal justice system); *Elkins v. United States*, 364 U.S. 206 (1960) (serves to deter lawless law enforcement activities); *Rea v. United States*, 350 U.S. 214 (1956) (serves to deter abuse of process by federal agencies); *McNabb v. United States*, 318 U.S. 332 (1943) (supervisory administration of criminal justice implies duty of establishing and maintaining civilized standards of procedures and evidence); *Berger v. United States*, 295 U.S. 78 (1935) (serves to deter prosecutorial misconduct).

focus of harmless error analysis is blind to this critical societal value.

> Prosecutors "have available a terrible array of coercive methods to obtain information," such as "police investigation and interrogation, warrants, informers and agents whose activities are immunized, authorized wiretapping, civil investigatory demands, [and] enhanced subpoena power." C. Wolfram, *Modern Legal Ethics*, 460 (1986). The misuse of those methods "would unfairly harass citizens, give unfair advantage to [the prosecutor's personal interests], and impair public willingness to accept the legitimate use of those powers." *Ibid.* Notwithstanding this concern, the determination whether an error was harmful focuses only on " 'whether there is a reasonable possibility that the [error] complained of might have contributed to the conviction.' " [citations omitted]. *A concern for actual prejudice in such circumstances misses the point, for what is at stake is the public perception of the integrity of our criminal justice system.* "[J]ustice must satisfy the appearance of justice," [citation omitted].

Young v. U.S. ex rel. Vuitton et Fils S.A., — U.S. —, 107 S.Ct. 2124, 2139-40 (1987) (emphasis added).

The Bank of Nova Scotia (hereinafter "the Bank"), our co-petitioner, phrases its question before this Court in language limiting the purpose for exercising supervisory power to "protect[ing] the integrity of the grand jury process from and to deter *willful, repeated, and pervasive misconduct by government attorneys.*" (emphasis added). We agree with the Bank that: (1) there is sufficient evidence in the record to support the trial court's findings of willful, repeated and pervasive misconduct by government attorneys, and (2) those findings require dismissal of the

Indictment. But the record contains abundant evidence of additional improprieties occasioned by *reckless* misconduct of government attorneys and Internal Revenue Service (IRS) agents and *willful* misconduct by IRS agents which was also both repeated and pervasive. Although *reckless* misconduct by government agents and attorneys superficially presents a less serious threat to the integrity of the criminal justice system, there is no logical nor empirical basis for that conclusion.

While deliberate introduction of perjured testimony is perhaps the most flagrant example of misconduct, other prosecutorial behavior, even if unintentional, can also cause improper influence and usurpation of the grand jury's role.[6] The instant case involves a twenty-seven count indictment, twenty-six counts of which are predicated on 18 U.S.C. § 371, charging a conspiracy to impair, impede, obstruct and defeat a lawful function of the Internal Revenue Service: the computation, assessment and collection of income taxes. Section 371 is the most all-encompassing, amorphous and chameleon-like criminal law in existence in the United States of America. This Court has observed that indictments under the broad language of this statute must be scrutinized carefully because of the possibility, inherent in a criminal conspiracy charge, that its wide net may ensnare the innocent as well as the culpable. *Dennis v. United States*, 384 U.S. 855 (1966); *Krulewitch v. United States*, 336 U.S. 440 (1949).

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[6] *United States v. Samango*, 607 F.2d 877 (9th Cir. 1979); *United States v. De Rosa*, 783 F.2d 1401 (9th Cir.), *cert. denied*, 106 S.Ct. 3282 (1986); *United States v. Hogan*, 712 F.2d 757 (2d Cir. 1983); *United States v. Serubo*, 604 F.2d 807 (3d Cir. 1979); *United States v. Basurto*, 497 F.2d 781 (9th Cir. 1974); *United States v. Estepa*, 471 F.2d 1132 (2d Cir. 1972).

As stated in the opinion filed by the trial court on September 24, 1984:

> On February 21, 1983, I dismissed the first twenty-six counts of the indictment for *failure to charge a crime* and as improperly pleaded. [emphasis added] [KA 50a].

This order of dismissal was entered prior to any suggestion of prosecutorial misconduct. In reversing this ruling, the Court of Appeals apparently misapprehended the *ratio decidendi*, concluding cursorily:

> All the defendants contend, and the district court agreed, that the failure to allege the lack of economic substance of the underlying programs rendered the indictment fatally defective. We disagree. [KA 10a].

But the thrust of the argument and the rationale of the ruling did not rest on the failure of the indictment to allege a lack of economic substance (KA 11a); rather, the fatal defect determined by the trial court's February 21, 1983, dismissal arises from the same matrix identified by the Ninth Circuit in *United States v. Dahlstrom*, 713 F.2d 1423, 1428-29 (9th Cir. 1983):

> [T]he legality of the tax shelter program advocated by the appellants in this case was completely unsettled by any clearly relevant precedent on the dates alleged in the indictment. "It is settled that when the law . . . is highly debatable, a defendant—actually or imputedly—lacks the requisite intent to violate it." *United States v. Critzer*, 498 F.2d 1160, 1162 (4th Cir. 1974). A criminal proceeding pursuant to [the same statutes as the case *sub judice*] "is an inappropriate vehicle for pioneering interpretations of tax law." *United States v. Garber*, 607 F.2d 92, 100 (5th Cir. 1979).
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> • • •

> These appellants were prosecuted in spite of the fact that no statute, regulation or court decision gave fair warning that advocacy of the . . . tax shelter [program] would result in a criminal prosecution if the challenged transaction might later be held to lack economic substance for purposes of a civil tax proceeding.

The Ninth Circuit held that prosecution of Dahlstrom and his co-defendants violated their first and fifth amendment rights because no crime was committed. In just the last two and one-half years the First, Seventh, Eighth, Ninth and Eleventh Circuit Courts of Appeals have dismissed indictments procured principally by the overzealous efforts of IRS agents because the acts and omissions alleged did not constitute criminal activity[7].

The significance of these decisions is two-fold: (1) Draconian application of the criminal law—particularly 18 U.S.C. § 371 and other statutes criminalizing offenses which are not *malum in se*—does not require willful, repeated or pervasive misconduct by government attorneys, i.e., recklessness and/or prosecutorial polarization of perspective are perhaps even more likely to ensnare the innocent; and (2) the criminal justice system can minimize this risk and maximize the trust and esteem of the public which is so essential to its effectiveness only through pre-trial dismissal of indictments obtained after significant viola-

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[7] *United States v. Gimbel*, 830 F.2d 621 (7th Cir. 1987); *United States v. Murphy*, 809 F.2d 1427 (9th Cir. 1987); *United States v. Larson*, 796 F.2d 244 (8th Cir. 1986); *United States v. Reinis*, 794 F.2d 506 (9th Cir. 1986); *United States v. Varbel*, 780 F.2d 758 (9th Cir. 1986); *United States v. Denemark*, 779 F.2d 1559 (11th Cir. 1986); *United States v. Anzalone*, 766 F.2d 676 (1st Cir. 1985).

tions of the legal limitations on law enforcement prerogatives.

We invite anarchy when we permit the government to act without scrupulous adherence to the procedural protections provided by: (1) the immunity statutes[8]; (2) the prohibition against adverse inferences from invocation of the privilege against self-incrimination[9]; (3) the limitations on persons present before the grand jury[10]; (4) the proscription against using the grand jury to gather evidence for civil purposes[11]; (5) the rules requiring secrecy of grand jury proceedings and anonymity of the subjects of inquiry[12]; (6) the laws criminalizing witness intimidation (18 U.S.C. § 1503)[13]; (7) the independence and impar-

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8 "Pocket Immunity" was provided to 23 witnesses and one was threatened with prosecution if his testimony was favorable to the targets. (KA 70a-74a).

9 After one grand juror informed the prosecutor that it was difficult to avoid drawing an adverse inference from one witness' refusal to testify on fifth amendment grounds, six more witnesses were paraded before the grand jury to make the same claim, and the prosecution falsely implied that Defendant Kilpatrick was paying their attorney's fees. (KA 74a-76a).

10 Numerous instances of tandem testimony by IRS agents, some in the absence of any attorney for the government, appear in the record. (KA 56a, 87a-88a).

11 A substantial amount of the evidence gathered via grand jury subpoenas was irrelevant to the criminal case and was disseminated to dozens of IRS personnel with no involvement in the criminal case. (KA 61a-64a, 88a-92a).

12 In addition to disclosures to civil IRS personnel, business associates of petitioners were advised of the subject matter and targets of the grand jury's inquiry, and secrecy obligations were imposed on targets' attorneys in violation of rule 6(e). (KA 64a-68a).

13 A tax law professor who testified as an expert that the tax shelters at issue were lawful was berated and intimidated in the presence of grand jurors. (KA 84a-85a).

tiality of the grand jury[14]; (8) the Sixth Amendment right to counsel, prohibiting post-indictment interrogation of defendants[15]; and (9) perjury statutes[16]. As Chief Justice Burger reflected in his opinion insisting on strict adherence to law by government agencies charged with duties of enforcement:

> The lines ascribed to Sir Thomas More by Robert Bolt are not without relevance here:
>
> > "The law, Roper, the law. I know what's legal, not what's right. And I'll stick to what's legal .... I'm *not God*. The currents and eddies of right and wrong, which you find such plain-sailing, I can't navigate, I'm no voyager. But in the thickets of the law, oh there I'm a forester . . . What would you do? Cut a great road through the law to get after the Devil? . . . And when the last law was down, and the Devil turned around on you where would you hide, Roper, the laws all being flat? . . . This country's planted thick with laws from coast to coast—Man's laws, not God's—and if you cut them down . . . d'you really think you could stand upright in the winds that would blow then? . . . Yes, I'd give the Devil benefit of law, for my own safety's sake." R. Bolt, *A Man for all Seasons*, Act I, p. 147 (Three Plays, Heinemann ed. 1967).

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14 IRS agents working for the prosecutor were sworn in as "agents of the grand jury," which was led to believe the agents' allegiance was no longer to the prosecution; these agents opined that the tax shelter program was unlawful. (KA 52a-57a).

15 Several violations of *Massiah v. United States*, 377 U.S. 201 (1964) were admitted by the government. (KA 100a-103a).

16 IRS agents purportedly "summarized" testimony, some of which was never given and critical portions of which were seriously misleading. (KA 55a-56a, 76a-81a).

Tennessee Valley Authority v. Hill, 437 U.S. 153, 195 (1978).

B. PRE-TRIAL REVIEW RENDERS HARMLESS ERROR ANALYSIS INAPPROPRIATE

In *Ballard v. United States*, 329 U.S. 187 (1946) this Court determined that exclusion of women from a federal grand jury required dismissal of the indictment even after conviction at trial, holding that dismissal:

> does not depend on a showing of prejudice in an individual case . . . The injury is not limited to the defendant—there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts.

Id. at 195 (footnote omitted). *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975) extended this federal rule to the states, reasoning:

> The purpose of a jury is to guard against the exercise of arbitrary power—to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge. [citation omitted] . . . [and] is also critical to public confidence in the fairness of the criminal justice system.

Limitation on the exercise of supervisory powers by application of a harmless error analysis was recently rejected by this Court in *Vasquez v. Hillery*, 474 U.S. 254, 261-262 (1986), a case which reversed a first degree murder conviction:

> Only six years ago, the Court explicitly addressed the question whether this unbroken line of case law [14 Supreme Court decisions from 1880 through 1972] should be reconsidered in favor of a harmless-error standard, and determined that it should not. [footnote and citation omitted]. We reaffirmed our conviction that discrimination on the basis of race in the selection of grand jurors "strikes at the fundamental values of our judicial system and our society as a whole, . . ." [citation omitted].

Two generations earlier the Court poured the foundation on which the current doctrine is constructed in *McNabb v. United States*, 318 U.S. 332, 340-43 (1943), reversing murder convictions:

> Judicial supervision of the administration of criminal justice in the Federal Courts implies the duty of establishing and maintaining civilized standards of procedure and evidence. Such standards are not satisfied merely by observance of those minimal historic safeguards for securing trial by reason which are summarized as "due process of law" and below which we reach what is really trial by force.
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> * * *
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> A democratic society, in which respect for the dignity of all men [and women] is central, naturally guards against the misuse of the law enforcement process. Zeal in tracking down crime is not in itself an assurance of soberness of judgment. Disinterestedness in law enforcement does not alone prevent disregard of cherished liberties. Experience has therefore counseled that safeguards must be provided against the dangers of the overzealous as well as the despotic.

Just last term the Court rejected harmless error analysis –again after conviction at trial—in *Young v. U.S. ex rel. Vuitton et Fils, supra*, at 2140-41, largely relying on the reasoning in *Holloway v. Arkansas*, 435 U.S. 475, 490-91 (1978):

> In the normal case where a harmless error rule is applied, the error occurs at trial and its scope is readily identifiable. Accordingly, the reviewing court can undertake with some confidence its relatively narrow task of assessing the likelihood that the error materially affected the deliberations of the jury. [citations omitted] .... [A]n inquiry into a claim of harmless error here [joint representation in criminal case caused conflict of interest for attorney] would require, unlike most cases, unguided speculation.

Given the numerous incidents of lawless governmental manipulation of the grand jury, there is no basis for believing that attempts to quantify prejudice here would be anything other than "unguided speculation."

Notwithstanding the substantial body of precedent rejecting both a requirement of prejudice and harmless error analysis in evaluating exercise of supervisory power, the majority of the court below relied on *United States v. Hasting*, 461 U.S. 499, 509 (1983) for its conclusion that:

> We remain convinced that the drastic remedy of dismissal of an indictment, whether premised on due process or supervisory powers theories, cannot be exercised without a significant infringement on the grand jury's ability to exercise independent judgment. [footnote omitted]. We are instructed clearly in *United States v. Hasting*, [*supra*] to ignore errors that are hramless, including most constitutional violations. [KA 39a].

The majority's characterization of dismissal as a "drastic remedy" is contradicted by cases reversing murder convictions based on supervisory powers, especially in view of the fact that the government was free to seek a supereeding indictment untainted by the indisputably

abundant abuses. As the Second Circuit observed, dismissing an indictment for prosecutorial misconduct:

> This would not let appellants go scot free, as there would be time to reindict them and have their guilt or innocence passed upon again on a record not tainted with irregularity. [citations omitted].

United States v. Estepa, 471 F.2d 1132, 1137 (2nd Cir. 1972).

Harmless error analysis in this case would require the reviewing court to affirm the dismissal of the indictment unless it could declare the misconduct harmless beyond a reasonable doubt, which the majority never did. Instead, the majority repeatedly relied on its conclusion that there was no proof of prejudice, impermissibly shifting the burden and changing the standard of proof.

Furthermore, *Hasting* provides little support for the majority's position. That case concerned prosecutorial misconduct consisting of a single reference during summation to testimony as uncontradicted where the defendant had elected not to testify and when he was the only person able to dispute the testimony.

> The opinion of the Court of Appeals does not make entirely clear its basis for reversing the convictions in this gruesome case [multiple kidnapping and repeated rape and sodomy]. Its cursory treatment of the harmless-error question and its focus on the failure generally of prosecutors within its jurisdiction to heed the court's prior admonitions about commenting on a defendant's failure to rebut the prosecution's case suggest that, notwithstanding the harmless nature of the error, the court acted in this case to discipline the prosecutor—and warn other prosecutors—for what it perceived to be continuing violations of *Griffin* [*v.*

California, 380 U.S. 609 (1965)] and § 3481. [which provides:

> In trial of all persons charged with offenses against the United States . . . the person charged shall, at his own request, be a competent witness. His failure to make such request shall not create any presumption against him.]

* * *

In view of this history of tension between what the Court of Appeals perceives as the requirements of *Griffin* and § 3481 and that court's view of the prosecutors' conduct, *we proceed on the assumption that, without so stating, the court was exercising its supervisory powers* to discipline the prosecutors of its jurisdiction. The question presented is whether, on this record, *in a purported exercise of supervisory powers*, a reviewing court may ignore the harmless-error analysis of *Chapman*. [*v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)], a case that the Court of Appeals had, in fact, failed to cite. We hold that the harmless error rule of *Chapman*, . . . may not be avoided by an assertion of supervisory power, simply to justify a reversal of these criminal convictions.

* * *

> The goals that are implicated by supervisory powers are not, however, significant in the context of this case if, as the Court of Appeals plainly implied, the errors alleged are harmless. . . . Finally, deterrence is an inappropriate basis for reversal where, as here, the prosecutor's remark is at most an attenuated violation of *Griffin* and where means more narrowly tailored to deter objectionable prosecutorial conduct are available.

Hasting, at 504 (emphasis added) (footnotes omitted). *Hasting* presented the reviewing court with "the relatively

narrow task of assessing the likelihood that the error materially affected the deliberations of the jury." *See* excerpt from *Holloway v. Arkansas, supra.* In the instant case, immediately after a witness was called before the grand jury for the sole purpose of invoking his fifth amendment privilege to prejudice the grand jury, one of the grand jurors advised the prosecutor, "I know that we are not supposed to think anything when they take the Fifth Amendment; being human, we do." (KA 10a).

The trial court (Kane, J.) found:

> In all, seven witnesses were called to invoke their privilege in February and March, 1982. That the purpose was to prejudice the grand jury against the targets and the tax shelter transactions under investigation, and not to lay a statutory predicate for immunizing the witnesses (which the prosecutor never did) cannot be denied. [KA 74a].

This Court should note that the other six witnesses were called *after* the candid admission by the grand juror quoted above. Though *Hasting* certainly supports the proposition that supervisory powers should not be employed to circumvent the limitations of the harmless error doctrine, it does not support the obverse contention that harmless error analysis should be employed to circumvent the salutary limitations of the courts' supervisory powers when the goals thereby protected are implicated significantly.

As the majority acknowledged, dismissal of an indictment may be properly premised on either or both of two distinct theories: (1) the fifth amendment due process or grand jury clauses; and (2) supervisory powers. Con-

cerning supervisory powers the majority observed, after citing *Hasting*:

> The supervisory powers theory focuses on deterring illegality and protecting judicial integrity. [citations omitted]. However, the *common theme* of the cases is that prosecutorial misconduct alone is not a valid reason to dismiss an indictment. "An indictment may be dismissed for prosecutorial misconduct which is flagrant to the point that there is *some significant infringement on the grand jury's ability to exercise independent judgment.*" [citations omitted]. [emphasis in original] [KA 17a].

First, the majority omitted one of the three purposes identified in *Hasting* as justifying the exercise of supervisory power: to implement a remedy for violation of recognized rights. Second, the *common theme* of the cases decided by this Court is that significant infringement on the grand jury's ability to exercise independent judgment is difficult and unnecessary to determine when judicial integrity or the appearance of integrity is threatened by prosecutorial misconduct. As Circuit Judge Seymour stated in the court below:

> I respectfully dissent from the view of the majority that prejudice to the defendant must be shown before a court can exercise its supervisory powers to dismiss an indictment on the basis of egregious prosecutorial misconduct.
>
> * * *
>
> Although acknowledging most of the improprieties set out in the lower court opinions, the majority does not agree with the district court that the Government's actions impaired the grand jury's ability to exercise its independent judgment, which is *the standard that must be met before the indictment may be dismissed under the Fifth Amendment.* Significantly, the majority also concludes that the sanction of dismissing the indictment is not a proper exercise of a district court's supervisory power unless the same standard is met, that is, unless there is a legally sufficient showing that the Government's misconduct adversely affected the grand jury's independence. Putting aside whether the impact of the Government prosecutors' behavior on the decision-making process of this grand jury can realistically be evaluated, I do not believe that such a showing is a prerequisite to the pre-trial dismissal of an indictment under a court's supervisory power. [KA 40a-43a] [emphasis added].

The majority has anastomosed the doctrines of supervisory power, harmless error, and the due process and grand jury clauses of the fifth amendment; the resulting melange causes confusion which can only be resolved by exploring the implications of reducing supervisory power to a meaningless excresence on the body of due process doctrine.

Harmless error analysis has never been utilized to evaluate pre-trial errors, whether judicial or prosecutorial. The majority repeatedly relies on *United States v. Mechanik*, 475 U.S. 66 (1986) and *United States v. Hasting, supra*, as authority for the proposition that " '[t]he relevant inquiry focuses on the impact of the prosecutor's misconduct on the grand jury's impartiality, not on the degree of the prosecutor's culpability.' " [KA 19a]. This reliance is misplaced because both *Mechanik* and *Hasting* involved lengthy trials and single technical prosecutorial violations which were neither repeated nor pervasive, even assuming *arguendo* that the transgressions were willful. Harmless error analysis in those cases properly focuses

on the district court's: (1) refusal to dismiss one of more than 20 counts in an indictment *after* a three-month long *trial* for a single violation of rule 6(d) (*Mechanik*); and (2) refusal to declare a mistrial *after* a lengthy, expensive and traumatic *trial* involving several victim witnesses who were kidnapped and repeatedly raped and sodomized, based on a single "attenuated violation" of *Griffin v. California*, 380 U.S. 609 (1965) during closing argument (*Hasting*).[17]

The unstated premise of the majority's opinion is that any amount of prosecutorial misconduct is harmless because the petit jury's verdict constitutes the cure. The logical conclusion of this line of reasoning yields complete nullification of the grand jury's exculpatory role. As Justice O'Connor noted, concurring in *United States v. Mechanik*, *supra*, 475 U.S. at 73-74:

> The grand jury has two principal functions. First, it bears the weighty responsibility of investigating crime and determining whether there is probable cause to believe that a crime has been committed. *United States v. Calandra*, 414 U.S. 338, 343 (1974). The second, and no less important task of the grand jury is to "serve the invaluable function of standing between the accuser and the accused, whether the latter be an individual, minority group, or other, to determine whether a charge is founded upon reason or dictated by an intimidating power or by malice and personal ill will. *Wood v. Georgia*, 370 U.S. 375, 390 (1962).

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17 Harmless error analysis in the instant case should properly focus on the trial courts' orders of dismissal, not on the government's misconduct: if the district court erred, such error was harmless beyond a reasonable doubt because the only effect of any pre-trial error was to require the government to obtain an untainted indictment.

This Court's decision in *Mechanik* contains the following language from which the majority apparently extrapolated its position:

> The error involving Rule 6(d) in these cases had the theoretical potential to affect the grand jury's determination whether to indict these particular defendants for the offenses with which they were charged. But the petit jury's subsequent guilty verdict not only means that there was probable cause to believe that the defendants were guilty as charged, but also that they are in fact guilty as charged beyond a reasonable doubt. Measured by the petit jury's verdict, then, any error in the grand jury proceeding connected with the charging decision was harmless beyond a reasonable doubt.

Mechanik, 475 U.S. at 70. But the majority fails to recognize the rationale for *Mechanik's* ruling—a balancing test which weighs the societal costs of reversing a conviction against the quality and quantity of error: victims may be asked to relive their disturbing experiences, e.g., *Hasting*, *supra;* passage of time, erosion of memory, and dispersion of witnesses may render retrial difficult, even impossible; reversal may reward the accused with complete freedom from prosecution and thereby cost society the right to punish admitted offenders; even if a defendant is convicted in a second trial, the intervening delay may compromise society's interest in the prompt administration of justice and impede accomplishment of the objectives of deterrence and rehabilitation. The social costs of reversal and retrial are an acceptable and often necessary expense to correct errors which deprived the defendant of a fair determination of his fate at trial, but the balance tips the other way when the error had no effect on the outcome of the trial. *Mechanik*, *supra* at 72.

In the instant case, none of the criteria enumerated in *Mechanik* (which include those considered in *Hasting*) provide any weight to support the majority's decision. The force of *Mechanik* and *Hasting* solidly supports the trial court. Furthermore, the delay here has been occasioned solely by the government's decision to appeal the dismissal rather than seeking, *mutatis mutandis*, a superceding indictment by an untainted grand jury.

C. PROSECUTORIAL MISCONDUCT WAS NOT "HARMLESS" BEYOND A REASONABLE DOUBT

It is syllepsis to apply harmless error analysis to prosecutorial misconduct when that doctrine is properly applicable only to judicial errors, i.e., mistakes by a presumptively impartial decision-maker such as a judge or grand jury. Errors caused by excessive zeal or deliberate design are actively encouraged when evaluated under a standard devised to excuse rather than deter. In the instant case the majority excused egregious prosecutorial misconduct on the basis that defendants had failed to show prejudice, characterizing their review as "harmless error analysis." This was error: harmless error analysis requires no showing of prejudice by defendants, but instead imposes on the reviewing court the duty to declare the errors "harmless beyond a reasonable doubt," which the Court of Appeals never did.

I. Mistreatment of the Tax Law Expert Witness

The majority's disposition of "the trial court's finding that the prosecutor's mistreatment of a witness favorable to the defense prejudiced the defendants" is illuminating.

> We find the mistreatment of the witness, an expert on tax matters, unjustifiable. The mistreatment occurred during a recess but within the hearing of several grand jurors, witnesses, and attorneys. The district court's opinion, however, focuses entirely on the conduct of the prosecutor and not on any resulting prejudice to the defendants. We conclude that the defendants have failed to show how the grand jury's independence was breached. The defendants are hard put to argue that this incident in the course of a twenty-month investigation threatened the grand jury's independence. [KA 33a-34a].

Ironically, not only are defendants not hard put to argue that this incident significantly impaired the grand jury's independence, defendants have never been put to the trouble because the trial court concluded that the prejudice was patent. The attack on the tax expert was intended to impugn the validity and veracity of his testimony asserting the legality of the tax shelters at issue. The attack on Professor Hjorth followed the parade of witnesses who invoked their right to remain silent after the prosecutors had been advised of the prejudicial impact of that procedure on the grand jurors, an effect significantly exacerbated by the prosecutor's suggestion that the witnesses' reticence was produced by Defendant Kilpatrick's payment of their attorneys' fees. Earlier grand jury transcripts reflect colloquy between the prosecutors concerning Defendant Kilpatrick's association with a convicted felon attorney named Saul Davidson, which one grand juror admittedly considered as evidence of Kil-

patrick's guilt.[18] (GJ transcript March 2, 1982). The likelihood of prejudice becomes even more substantial in view of the fact that IRS agents Mendrop and Raybin had been ceremoniously sworn as "agents of the grand jury," an apocryphal "role" of which the jurors were repeatedly reminded, and testified to legal conclusions diametrically opposed to Professor Hjorth's. Assuming *arguendo* that harmless error analysis were appropriate, even the majority was unable or unwilling to assert that the errors were harmless beyond a reasonable doubt. *Chapman v. California, supra.*

Impairment of the grand jury's impartiality in this case is uniquely critical to the charging decision because the conflicting testimony of the tax law professor and the agents goes to the very existence of the crimes charged. *See United States v. Dahlstrom, supra; United States v. Garber,* 607 F.2d 92 (5th Cir. 1979); *United States v. Critzer,* 498 F.2d 1160 (4th Cir. 1974). As this Court explained in *Vasquez v. Hillery, supra* at 263:

> The grand jury does not determine only that probable cause exists to believe that a defendant committed a crime, or that it does not. In the hands of the grand jury lies the power to charge a greater offense or a lesser offense; numerous counts or a single count; and perhaps most significant of all, a capital offense or a noncapital offense—all on the basis of the same

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[18] *See Bruno v. Rushen,* 721 F.2d 1193 (9th Cir. 1983); *United States v. Hogan,* 712 F.2d 757 (2d Cir. 1983); *United States v. Ciambrone,* 601 F.2d 616 (2d Cir. 1979); *United States v. Samango,* 607 F.2d 877 (9th Cir. 1979); *United States v. Serubo,* 604 F.2d 807 (3d Cir. 1979); *United States v. Basurto,* 497 F.2d 781 (9th Cir. 1974); *United States v. Estepa,* 471 F.2d 1132 (2d Cir. 1972).

> facts. Moreover, "[t]he grand jury is not bound to indict in every case where a conviction can be obtained." *United States v. Ciambrone,* 601 F.2d 616, 629 (CA2 1979) (Friendly, J., dissenting). *Thus even if a grand jury's determination of probable cause is confirmed in hindsight by a conviction on the indicted offense, that confirmation in no way suggests that the discrimination [or, in this case, manipulation and misinformation] did not impermissibly infect the framing of the indictment and, consequently, the nature or very existence of the proceedings to come.* [emphasis added].

II. Violations of F.R.Crim.P. 6(d)

Rule 6(d), F.R.Crim.P., delimits those who may be present in grand jury proceedings by the following explicit language:

> Who May Be Present. Attorneys for the government, the witness under examination, interpreters when needed and, for the purpose of taking the evidence, a stenographer or operator of a recording device may be present while the grand jury is in session, but no person other than the jurors may be present while the grand jury is deliberating or voting.

This Court in *Mechanik, supra,* rejected a *per se* rule of dismissal based on a single 6(d) violation in the process of obtaining a supercceding indictment, after a three-month trial, where the original indictment reflecting the same charge untainted by the 6(d) violation demonstrated the irrelevance of the 6(d) violation to the challenged count. The instant case involves pre-trial dismissal of an indictment—not a supercceding indictment—procured after many joint appearances by IRS special agents before the grand jury, often without the presence of government counsel. (KA 56a-57a). Furthermore, the agents were fre-

quently unsworn. The majority agreed with the trial court's findings of 6(d) violations, but held:

> [t]hat a *per se* rule of dismissal for Rule 6(d) violations as earlier applied in *United States v. Pignatiello*, 582 F.Supp. 251, 254-55 (D. Colo. 1984) (and cases cited therein), is no longer proper since *Mechanik*. We find no other circumstances showing that the violation of the Rule resulted in prejudice or infringement on the grand jury's independent functioning, as discussed below. Thus the dismissal for violations of Rule 6(d) without more cannot stand. [KA 24a].

Because of the district court's disposition, petitioners had no opportunity to show the possible impact of the 6(d) infractions. The majority's unwarranted expansion of this Court's ruling in *Mechanik* has converted a *per se* rule of dismissal into a *per se* rule of harmless error, effecting precisely the result presaged by Justice O'Connor, concurring in *Mechanik*, 475 U.S. at 73:

> I believe that the analysis adopted by the Court for determining the effect of a violation of the rules governing the conduct of grand juries effectively renders those rules a dead letter, thereby seriously undermining the grand jury's traditional function of protecting the innocent from unwarranted public accusation.

III. Violations of F.R.Crim.P. 6(e)

The trial court devoted more than twenty pages of its opinion to detailed discussion of the government's numerous egregious transgressions of the four prohibitions contained in F.R.Crim.P. 6(e). (See full text of the Rule at KA 158a-159a).

During the course of the grand jury investigation, the government representatives systematically

disregarded the strictures of Rule 6(e). The record demonstrates that the responsibility and decision making authority that Rule 6(e) vests in government attorneys was relinquished to and exercised by the Internal Revenue Service. Members of that agency undertook a policy of determining whether and to whom disclosure of confidential material would be made and whether notification of such disclosure would be made pursuant to the Federal Rules. Moreover, the evidence suggests that information was disclosed to other IRS agents for use in civil cases. Grand jury secrecy was repeatedly breached by those with a duty to remain silent and secrecy obligations were imposed upon others of whom the law does not require confidentiality. [KA 58a].

(a) Disclosure

Disclosure notices filed pursuant to Rule 6(e)(3)(B) and hearings in the trial court establish that numerous individuals at all levels of the Internal Revenue Service who had no interest in anything other than civil tax collection were given access to grand jury material; furthermore, many of the recipients of the material have never been identified and still remain unknown. The IRS agents admitted that they, rather than the prosecutors, routinely decided which individuals would receive grand jury material, a violation of Justice Department rules acknowledged by the government. The government also admitted that the IRS agents, rather than the prosecutors, determined who among the recipients would be identified although all are required by Rule 6(e), which resulted in the omission of numerous required names and the identification of numerous other recipients without any explanation or justification. (KA 58a-59a).

This Court's recent decisions in *United States v. Baggot*, 463 U.S. 476 (1983) and *United States v. Sells Engineering, Inc.*, 463 U.S. 418, 431-34 (1983), demonstrate the gravity of the extensive episodes of 6(e) violations in this case, which frustrate every purpose identified in *Sells:*

> Not only is disclosure for civil use unjustified by the considerations supporting prosecutorial access, but it also threatens to do affirmative mischief. The problem is threefold.
>
> First, disclosure to Government bodies raises much the same concerns that underlie the rule of secrecy in other contexts. . . . If a witness knows or fears that his testimony before the grand jury will be routinely available for use in governmental civil litigation or administrative action, he may well be less willing to speak for fear that he will get himself into trouble in some other forum. [citation omitted].
>
> Second, because the Government takes an active part in the activities of the grand jury, disclosure to Government attorneys for civil use poses a significant threat to the integrity of the grand jury itself. If prosecutors in a given case [and *a fortiori* IRS agents unconstrained by rules for prosecutors] knew that their colleagues would be free to use the materials generated by the grand jury for a civil case, they might be tempted to manipulate the grand jury's powerful investigative tools to root out additional evidence useful in the civil suit, or even to start or continue a grand jury inquiry where no criminal prosecution seemed likely. Any such use of grand jury proceedings to elicit evidence for use in a civil case is improper *per se*. [citation omitted] . . . Our concern is based less on any belief that grand jury misuse is in fact widespread than on our concern that, if and when it does occur, it would often be very difficult to detect and prove. Moreover, as the legislative history discussed *infra*, Part III-B, shows, our concern over possible misappropriation of the grand jury itself was shared by Congress when it enacted the present version of Rule 6(e). Such a potential for misuse should not be allowed absent a clear mandate in the law.
>
> Third, use of grand jury materials by Government agencies in civil or administrative settings threatens to subvert the limitations applied outside the grand jury context on the Government's powers of discovery and investigation. While there are some limits on the investigative powers of the grand jury, [footnote omitted] there are few if any other forums in which a governmental body has such relatively unregulated power to compel other persons to divulge information or produce evidence. Other agencies, both within and without the Justice Department, operate under specific and detailed statutes, rules, or regulations conferring only limited authority to require citizens to testify or produce evidence. . . . To allow these agencies to circumvent their usual methods of discovery also would not only subvert the limitations and procedural requirements built into those methods, but would grant to the Government a virtual *ex parte* form of discovery, from which its civil litigation opponents are excluded unless they make a strong showing of particularized need.

Although accepting the district court's factual findings and acknowledging awareness of this Court's scholarly exegesis in *Sells Engineering* excerpted above, the majority rejected its reasoning, resorting to tautological and talismanic invocation of the shibboleth: "We fail to see how such a violation should result in dismissal of the indictment . . . Any misconduct was not so flagrant that the grand jury's independence was infringed." (KA 22a-23a, 24a, 26a, 28a, 29a, 30a, 31a, 32a, 33a, 35a, 36a-37a, 38a, 39a):

The district court points to the extensive disclosure of grand jury materials to IRS civil employees as well as the haphazard and *post hoc* method of identifying those to whom disclosure was made as probative of Rule 6(e) violations. 594 F.Supp. 1343-44. The court also cites as grounds for dismissal the "serious possibility" that IRS representatives improperly manipulated the grand jury to obtain materials for civil litigation purposes; the judge later found that the record "confirms that the grand jury's extraordinary powers and resources were, in part, initiated and channeled for just such a purpose." *Id.* at 1332 (footnote omitted). The court found also that the prosecutors showed a disregard for the secrecy provisions of Rule 6(e); that grand jury information had been disclosed in violation of Rule 6(e); and that a prosecutor had improper motives when he imposed unauthorized secrecy obligations on grand jury witnesses.

> [W]e fail to see how the grand jury's independence was usurped in such a significant way as to amount to grand jury abuse. *See Pino*, 708 F.2d at 530.
>
> Further, we do not see how the preparation of a catch-all disclosure list significantly infringed the grand jury's independence. [KA 29a-30a].

(b) Improper Use

The majority's truncated treatment of Rule 6(e) violations did not reject, but, rather, simply ignored District Judge Kane's detailed findings that:

(i) The IRS institutional intent to take advantage of the grand jury investigation in civil audits was confirmed by Richard Gullion, a civil IRS agent who candidly conceded that the IRS intended to utilize the fruits of the grand jury's investigation for that purpose (KA 61a):

(ii) IRS agents interviewed numerous tax shelter investors after referring the investigation to the Justice Department to obtain the investigative assistance of a grand jury because IRS administrative processes were potentially ineffective; the interviewees were threatened that if they did not speak voluntarily in lieu of a grand jury appearance, they would be subpoenaed to appear before that body (KA 62a);

(iii) the interviews were utilized to obtain information clearly relevant to civil tax collection, but irrelevant to the grand jury's inquiry, a conclusion clearly corroborated by the fact that none of the interviews, none of the interviewees, nor any results therefrom was ever presented to the grand jury—nor did the government ever proffer any purpose for the interviews (KA 63a);

(iv) utilizing the grand jury material, IRS civil audit personnel performed audits, none of which was presented to the grand jury, again without explanation by the government; subsequent to the indictment the IRS has issued civil audit letters to the interviewees-investors, notifying them that their returns were being examined and advising them that "[a] report will be issued in the near future containing a position consistent with facts as presented to the Federal Grand Jury Indictment of September 30, 1982 for the United States District Court for the District of Colorado" (KA 63a-64a); and, finally

(v) the entire case was permeated by prosecutorial vindictiveness (KA 64a).

Each of the three purposes identified by this Court in *Sells Engineering* was thoroughly frustrated by the undisputed misconduct of the government in this case, all of

which was obfuscated by the majority's reference to its inability to see how the grand jury's independence was compromised.

(c) Secrecy Violations

Third of the four types of Rule 6(e) infractions found by the trial court in this case were deliberate disclosures designed to embarrass the targets, interfere with the operation of their businesses, and gain an advantage in connection with the intended prosecution. Letters typed on United States Attorney's letterhead were sent to individuals beyond the subpoena power of the grand jury with whom it was understood the targets had ongoing business relationships.[19] District Judge Winner responded to revelation of these letters by observing:

---

[19] The letters stated in pertinent part:

The United States Department of Justice is conducting a Grand Jury investigation of . . . William A. Kilpatrick, Declan J. O'Donnell, John Pettingill and Sheila C. Lerner for the years 1977 through 1980. The Grand Jury is attempting to determine whether these individuals, through United Financial Operations, Inc., P & J Coal Company, Inc., Marlborough Investments, Ltd., International Fuel Development Corp., Ltd., and International Block Construction Company, Ltd., have committed violations of Title 18 and Title 26 of the United States Code.

The Grand Jury has obtained information which indicates that you have had and/or currently do have a business relationship with one or more of the individuals and/or entities listed above. It has been determined that your testimony will be helpful in resolving questions which still face the Grand Jury. Subsequently, [sic] the United States Department of Justice cordially invites you to appear and to testify before the Federal Grand Jury in Denver, Colorado (U.S.A.) at your con-

(Continued on following page)

> [T]he identity of the persons and transactions under grand jury scrutiny shouldn't be disclosed to anyone by letter or otherwise, but these startling letters did precisely that. [KA 66a-67a].

Prejudicial disclosure of the targets and the nature of the grand jury investigation was not limited to these "startling letters"; additional disclosures were made to investors and, on one occasion, to a prospective target to induce his cooperation. (KA 67a).

(d) Improper Imposition of Secrecy Obligations

Finally, in clear violation of F.R.Crim.P. 6(e)(2) and for an improper strategic purpose, the government purported to impose secrecy obligations on two grand jury witnesses, David H. Hoff and David R. Major, as evidenced by the following colloquy contained in transcripts of grand jury proceedings on January 5, 1982:

> **Q: You are also aware that the proceedings of this Grand Jury are secret and that is covered by Rule 6 of the Federal Rules of Criminal Procedure, that is,**

(Continued from previous page)

venience. Transportation, lodging and meals will be arranged for and paid by the United States Department of Justice.

* * *

We look forward to your response,

Sincerely yours,

Stephen L. Snyder
Trial Attorney
Criminal Section
Tax Division
By Paul E. Raybin
Special Agent

(KA 65a-66a).

> any questions I put to you today, questions that the Grand Jury may have, any discussion we have in this room at your appearance, that your appearance should be kept secret by you; do you understand that?
>
> A: Yes, sir, I do. [KA 68a].

The trial court specified that: the 6(e) violations were neither innocent nor inadvertent; Messrs. Hoff and Major were attorneys who had represented Petitioners Kilpatrick and O'Donnell in previous SEC proceedings involving the same tax shelters under investigation by the grand jury; the interrogation of the lawyers focused directly on the contents of privileged communications between them and their respective clients, Kilpatrick and O'Donnell; the purpose of the unauthorized secrecy obligations was to prevent Kilpatrick and O'Donnell from learning of any possible violations of their attorney-client privileges in order to foreclose any challenge to such testimony. (KA 68a-69a); and the government never offered a legitimate explanation for the activity, which violated the United States Attorneys' Manual at § 9-11.362. (KA 94a-95a).

The trial court, Kane, J., held:

> [t]hat where violations of Rule 6(e) are intentional or reckless and systemic, the sanction of contempt is insufficient and dismissal of the indictment is warranted. *Under such circumstances, it is not necessary for the defendant to show that he has been prejudiced by the violations. In the instant case, however, such showing of prejudice has been convincingly made.* [KA 95a] [emphasis added].

To all of the trial court's findings of fact and conclusions of law, the majority responded:

(a) the district court's factual findings as well as the legal conclusions drawn were in error (KA 20a);

(b) the indictment was the product of an independent grand jury and thus valid (KA 20a);

(c) the district court's dismissal for violations of Rule 6(d) without more cannot stand (KA 24a);

(d) insofar as the district court relied on reckless and systematic violations of Rule 6(e) as *per se* grounds for dismissal, we hold that such Rule 6(e) violations *ipso facto* do not justify dismissal (KA 26a);

(e) assuming unauthorized disclosure, disregard for secrecy required by Rule 6(e), improper motives for imposing unauthorized secrecy and noncompliance with the rule requiring identification of all persons given access to grand jury material, "we fail to see how the grand jury's independence was usurped in such a significant way as to amount to grand jury abuse." (KA 29a-30a).

IV. Use of Pocket Immunity

During the course of the investigation twenty-three witnesses were provided with so-called "pocket immunity" contrary to the explicit provisions of 18 U.S.C. §§ 6001 *et seq.* (KA 70a.) None of the witnesses thus immunized ever indicated an unwillingness to testify without immunity, a statutory prerequisite to immunity; ironically, prosecutors never sought immunity for the only witnesses who satisfied this statutory predicate, and who were compelled to invoke the fifth amendment before the grand jury. (KA 71a). The grand jurors were given conflicting explanations for the purposes and effects of this "immunity," thereby impairing their ability to assess credibility. (KA

72a-73a). Moreover, the "informal immunity" provided by the prosecutors left every "immunized" witness fearful that, unless their testimony pleased the government, the government could withdraw the immunity and prosecute the witness. (KA 73a).

The most detailed example of this problem was described in Judge Winner's opinion, involving one Richard Bell, a witness who testified with a "Letter of Assurance":

> Mr. Bell was represented by his brother Malcolm, an attorney practicing in New York City, and a witness I found to be straight-forward, fair, convincing, and most generous to [the prosecutor]. Malcolm Bell succumbed to the carrot of pocket immunity for his brother, but, later he was told [by the prosecutor] that if Richard [Bell] 'testified for Mr. Kilpatrick, all bets were off.' Maybe this meant that if Mr. Bell perjured himself he would be prosecuted for perjury, but if the immunity statute had been followed, the nagging question of the meaning of 'all bets are off' wouldn't confront us. 575 F.Supp. at 335. [KA 73a].

The district court held that the repeated use of letters of assurance or so-called "pocket immunity" violated 18 U.S.C. §§ 6001 *et seq.* and tainted the grand jury indictment. (KA 98a). The majority rejected this conclusion, holding that "the use of 'informal immunity' which has been frequently upheld, is entirely proper. (citation omitted). Moreover, the defendants have failed to show how the use of informal immunity prejudiced the grand jury." (KA 28a). This Court should note that the trial court did not dismiss the indictment solely for the use of pocket immunity in violation of 18 U.S.C. §§ 6002 and 6003, but considered these infractions under the "totality of circumstances test." (KA 103a-104a, 107a).

V. Violations of the Sixth Amendment

In February of 1983, more than four months after the indictment was returned, one of the government's prosecutors travelled to Puerto Rico to interrogate Malcolm Haynes, an employee of the Bank of Nova Scotia, in the hope of questioning Haynes in the absence of the Bank's attorneys. After conducting surveillance of Mr. Haynes' two daughters, aged eight and ten years, at the school they attended, thereby locating their mother in order to violate Mr. Haynes' spousal privilege, the prosecutor wrote a letter to Mrs. Haynes soliciting her cooperation in obtaining Mr. Haynes' assistance, again in the hope that counsel for the Bank would not be notified. (KA 82a-84a). This flight of fantasy, albeit in admitted violation of *Massiah v. United States*, 337 U.S. 201 (1964) and *Brewer v. Williams*, 430 U.S. 387 (1977), which was "explained" on the basis that the worst to be expected from the constitutional violations would be a limited suppression of evidence, drew relatively little attention from the courts below. The trial court held that no prejudice had been shown, but allowed as how the violations entered into the general qualitative assessment of government misconduct. (KA 100a-103a).

In the two short sentences devoted to the topic by the majority, it determined that even this limited consideration of the *Massiah* violations by the trial court was error (KA 28a), notwithstanding the "totality of the circumstances test" approved by the majority. (KA 26a).

VI. "Summaries of the Evidence" by Self-Proclaimed Agents of the Grand Jury

As found by the trial court, despite detailed instruction from the impaneling court that the grand jury should

maintain its independence and not become an "agent of the prosecution," shortly after both grand juries had been impaneled the prosecutors created the office of "agent of the grand jury" for IRS Special Agents Mendrop and Raybin, who had been assigned by the IRS to assist the prosecutors. Several months after the second grand jury began its inquiry, the office of "agent of the grand jury" was conferred on another IRS agent named Schneider, who testified as an expert concerning the tax shelters here at issue. In all three cases the IRS agents were inaugurated as "agents of the grand jury" by the prosecutor's administration of an oath he had invented before the grand jury, which was done for the sole purpose of misleading the grand jury as to the loyalty and credibility of these IRS agents. Notwithstanding the admitted facts that the office of "grand jury agent" was a government fabrication, the grand jurors were repeatedly urged to rely upon the testimony of these men as that of *their* agents, rather than that of agents of the prosecution as they in fact were. (KA 52a-53a). Agents Mendrop, Raybin and Schneider did not merely assist the prosecutors; they testified to their legal conclusions, which were, not surprisingly, that the tax shelters were blatantly illegal. (KA 54a-55a). To compound the false impression intentionally created in the minds of the grand jurors concerning the agents' credibility, Messrs. Mendrop, Schneider and Raybin purported to summarize the evidence for the grand jury to support the twenty-seven count indictment presented by the government attorneys. These summaries contained numerous inaccuracies and were misleading in several respects. (KA 56a).

The government falsely asserted that the "evidence" indicated that the Bank of Nova Scotia representatives were familiar with Mr. Kilpatrick's business operations and that the banking activities had defrauded the IRS. Although no evidence of the kind suggested by the prosecutor had been presented, Agent Mendrop was introduced to the grand jurors as one who was to "summarize" and "just walk through, one more time, and refresh your memory," immediately prior to presenting the indictment for the grand jurors' endorsement. (KA 76a-77a). In particular, Mendrop purported to "summarize" in connection with the bank's role the testimony presented by three witnesses: Messrs. Waters, Ros and Charles. Scrutiny of the grand jury testimony, however, disclosed that Mendrop was not summarizing evidence before the grand jury: one of the witnesses whose testimony was "summarized" never appeared before either grand jury and the other two witnesses whose testimony was "summarized" did not give testimony even remotely resembling Mendrop's putative "summaries." (KA 77a).

The district court's opinion includes an exhaustive analysis and discussion of the transcripts containing the office and pseudo-investiture of the three grand jury agents and their false and misleading testimony on crucial issues, covering some fifteen pages. (KA 52a, 57a, 76a-81a, 87a-88a, 90a, 99a-100a). The majority's treatment of the trial court's determinations on these two issues—quoted in its entirety—is astonishing:

> We are not persuaded by the several reasons given for the dismissal. First, summaries of evidence given before the grand jury are permissible and often helpful, especially in complicated cases such as this. [This

is synecdoche: the issue was not whether, generally, "summaries are permissible," but rather whether *the false summaries in question* were "harmless beyond a reasonable doubt."] It must be remembered that this complicated tax fraud case spanned twenty months and involved two grand juries. Moreover, the district court is prohibited from looking behind the indictment to determine if it was based on inadequate or incompetent evidence. *Costello*, 350 U.S. at 363, 76 S.Ct. at 408; *see also United States v. Kysar*, 459 F.2d 422, 424 (10th Cir. 1972). fn.12.

---

fn. 12 We note that no claim was made nor did the court find that the government attorneys used perjured testimony, knowingly, or unknowingly, before the grand jury.

[KA 27a-28a].

Whether characterized as catachresis or casuistry, the majority's refusal to recognize the significance, nature and extent of the indisputably false testimony disguised by the "grand jury agents" as "summaries" constitutes a catastrophe. The failure to employ the parameters proper to supervisory power is, presumably, ineluctable.

> The district court found that the use of the title "agents of the grand jury" by IRS agents misled the grand jury. [footnote omitted]. However, "Fed.R. Crim.P., contemplates the use of government agents, such [as] IRS agents, to assist an attorney for the government in his handling of a grand jury investigation." [citation omitted]. We need not decide here whether the use of "grand jury agents" violated the Rule 6 prohibition against unauthorized presence or unauthorized disclosure. [footnote omitted]. There is no showing by the defendants as to how this record reveals any actual prejudice to them in the proceedings by overreaching the grand jury or usurping its independence through this conduct. [KA 32a-33a].

CONCLUSION

As discussed in Section C.I., *supra*, the unjustifiable mistreatment of the tax law professor discredited his opinion and the fraudulent attempts to accredit the "agents of the grand jury" were designed to remedy the critical weakness in the government's case:

> [T]he legality of the tax shelter program . . . in this case was completely unsettled by any clearly relevant precedent on the dates alleged in the indictment. "It is settled that when the law . . . is highly debatable, a defendant—actually or imputedly—lacks the requisite intent to violate it." [citation omitted].

United States v. Dahlstrom, supra, at 1428.

In contrast to what is permitted under other legal systems, the Constitution of the United States requires that before any person is held accountable for committing a crime, the crime with which he is to be charged must be clearly and succinctly defined to give fair warning. *United States v. Anzalone, supra* at 678; *Kolender v. Lawson*, 461 U.S. 352, 357 (1983).

Just like it did to the *Dahlstrom* defendants, the government violated the first and fifth amendment rights of these petitioners by bringing this indictment. The parade of witnesses invoking their rights to remain silent coupled with the suggestion that defendants were paying for that silence was another ploy to supply the missing ingredient

in the government's presentation: evidence of specific intent. The government misconduct condemned in *United States v. Roberts*, 481 F.Supp. 1385, 1389 (C.D. Cal. 1980) (attempting to discredit and slant the testimony of defendant's exculpatory witness; *cf.* mistreatment of Professor Hjorth); *United States v. Samango, supra*, at 882-83 (presentation of inaccurate informant testimony and hearsay provided by DEA agent laden with conclusions as to defendants' guilt; *cf.* Mendrop, Raybin and Schneider), and *United States v. Hogan, supra*, at 761 (accusations made, not to support additional charges, but in order to depict defendants as bad persons and thereby obtain indictment; *cf.* attack on defendants' tax law expert and suggestion that defendants purchased silence of seven witnesses), pales by comparison to the governmental misconduct catalogued by the trial courts in this case.

The majority compounded its inability to see obvious potential prejudice by improperly and repeatedly shifting the burden of proof to the petitioners: once a *prima facie* showing of constitutional error is made, the burden shifts to the government to demonstrate that such error is harmless beyond a reasonable doubt. *Rose v. Clark*, — U.S. —, 106 S.Ct. 3101 (1986); *Francis v. Franklin*, 471 U.S. 307 (1985). But in applying this standard to a case involving serious supervisory powers implications, the error must not only be harmless to the defendants, it must be harmless to the integrity and the appearance of integrity of the criminal justice system. Here the majority substituted "insubstantial findings of fact to screen reality" and thereby defeated guarantees in the Bill of Rights and denigrated the appearance of justice. *N.A.A.C.P. v. Claiborne Hardware*, 458 U.S. 886, 924 (1982). The district

court's meticulous factual analysis to support its conclusions "that the grand jury's function was usurped and that the indictment was tainted with illegality," was vitiated by the majority's holding "that if those determinations are ultimate fact-findings, they are clearly erroneous in light of the record;" this constitutes "insubstantial findings of fact screening reality." This Court should demonstrate the proper and appropriate exercise of supervisory powers by reversing the Court of Appeals, reinstating the district court's judgment, findings of fact and conclusions of law, and restoring a measure of integrity to our criminal justice system.

Respectfully submitted,

WILLIAM A. COHAN*
JENNIFER A. GREENE
COHAN & GREENE
1801 York Street
Denver, Colorado 80206
(303) 321-0999

Attorneys for Petitioners
William A. Kilpatrick
Declan J. O'Donnell and
Sheila C. Lerner

*Counsel of Record

APPENDIX A

Amendment VI, United States Constitution

Rights of the accused.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

United States Code and Service
Section 1503

Influencing or injuring officer or juror generally.

Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner [magistrate] or other committing magistrate, in the discharge of his duty, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account or his being or having been such juror, or injures any such officer, commissioner [magistrate], or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any

threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

(9) (8)

Nos. 87-578 and 87-602

Supreme Court, U.S.
FILED
MAR 28 1988
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1987

THE BANK OF NOVA SCOTIA, PETITIONER

v.

UNITED STATES OF AMERICA

WILLIAM A. KILPATRICK, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

CHARLES FRIED
Solicitor General

WILLIAM S. ROSE, JR.
Assistant Attorney General

WILLIAM C. BRYSON
Deputy Solicitor General

ROBERT H. KLONOFF
Assistant to the Solicitor General

GARY R. ALLEN
ROBERT E. LINDSAY
ALAN HECHTKOPF
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

64 pp

QUESTION PRESENTED

Whether a district court may dismiss an indictment for misconduct in the course of a grand jury investigation, where the misconduct has not prejudiced the defendants.

PARTIES TO THE PROCEEDINGS

In addition to the parties named in the caption, the following individuals were appellees in the court of appeals and are petitioners here: Declan J. O'Donnell and Sheila C. Lerner. Michael Alberga and C.S. Gill were also appellees in the court of appeals but are not petitioners here.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statute and rules involved	2
Statement	2
Summary of argument	7
Argument:	
I. An indictment may not be dismissed for grand jury abuse in the absence of prejudice to the defendant	9
A. A facially valid indictment is ordinarily immune from challenge based on alleged defects in the grand jury process	9
B. Dismissal of an indictment in the absence of prejudice would conflict with 28 U.S.C. 2111 and Fed. R. Crim. P. 52(a)	12
C. This Court's decisions compel the conclusion that an indictment may not be dismissed for procedural irregularities in the grand jury in the absence of prejudice	15
D. Dismissal of an indictment for procedural defects in the grand jury that do not affect the grand jury's charging decision would be unsound as a matter of policy	22
II. Dismissal of the indictment would be inappropriate in this case even if an indictment may be dismissed without a showing of prejudice	26
1. Use of the term "agents of the grand jury"	30
2. Presentation of summaries of evidence	32
3. Mistreatment of an expert witness	35
4. Granting informal immunity	38
5. Calling witnesses who asserted their privilege against compulsory self-incrimination	39
6. Violations of Rule 6(d)	41
7. Alleged use of grand jury to gather information for civil purposes	43

Contents – Continued: Page

8. Disclosure of the identity of targets of the investigation 46
9. Imposition of secrecy obligations on two witnesses 47

Conclusion 51

Appendix 1a

TABLE OF AUTHORITIES

Atterbury, In re, 323 F.2d 726 (6th Cir. 1963) 30
Baker v. *United States*, 389 F.2d 629 (7th Cir.), cert. denied, 393 U.S. 875 (1968) 41
Beavers v. *Henkel*, 194 U.S. 73 (1904) 9
Bracy v. *United States*, 435 U.S. 1301 (1978) 9-10
Chambers v. *Maroney*, 399 U.S. 42 (1970) 17
Chapman v. *California*, 386 U.S. 18 (1967) 17, 18, 21
Coleman v. *Alabama*, 399 U.S. 1 (1970) 17
Costello v. *United States*, 350 U.S. 359 (1956) 8, 9, 10, 11, 12, 22, 23, 25, 32
Delaware v. *Van Arsdall*, 475 U.S. 673 (1986) 17, 28
Ewing v. *United States*, 386 F.2d 10 (9th Cir. 1967), cert. denied, 390 U.S. 991 (1968) 40
Grand Jury Proceedings (Mills), In re, 686 F.2d 135 (3d Cir.), cert. denied, 459 U.S. 1020 (1982) 30
Grand Jury Proceedings (Pavlick), In re, 680 F.2d 1026 (5th Cir. 1982) 40
Greer v. *Miller*, No. 85-2064 (June 26, 1987) 37
Harrington v. *California*, 395 U.S. 250 (1969) 17
Holland v. *United States*, 348 U.S. 121 (1954) 40
Kotteakos v. *United States*, 328 U.S. 750 (1946) 21
Lawn v. *United States*, 355 U.S. 339 (1958) 9, 49
Massiah v. *United States*, 377 U.S. 201 (1964) 49
Milton v. *Wainwright*, 407 U.S. 371 (1972) 17
Moore v. *Illinois*, 434 U.S. 220 (1977) 17
Namet v. *United States*, 373 U.S. 179 (1963) 41
Palermo v. *United States*, 360 U.S. 343 (1959) 12
Perlin, In re, 589 F.2d 260 (7th Cir. 1978) 30
Pope v. *Illinois*, No. 85-1973 (May 4, 1987) 17
Richardson v. *Marsh*, No. 85-1433 (Apr. 21, 1987) 37

Cases – Continued: Page

Rose v. *Clark*, 478 U.S. 570 (1986) 17, 18, 19, 20
Rushen v. *Spain*, 464 U.S. 114 (1983) 17
Sealed Case, In re, 676 F.2d 793 (D.C. Cir. 1982) 49
Spies v. *United States*, 317 U.S. 492 (1943) 40
Strickland v. *Washington*, 466 U.S. 668 (1984) 17
Thomas v. *Arn*, 474 U.S. 140 (1985) 12, 13
United States v. *Anderson*, 577 F. Supp. 223 (D. Wyo. 1983), rev'd, 778 F.2d 602 (10th Cir. 1985) 38
United States v. *Arnold*, 773 F.2d 823 (7th Cir. 1985) 40
United States v. *Baggot*, 463 U.S. 476 (1983) 44, 45
United States v. *Bagley*, 473 U.S. 667 (1985) 17
United States v. *Baker*, 611 F.2d 964 (4th Cir. 1979) 40
United States v. *Blitz*, 533 F.2d 1329 (2d Cir.), cert. denied, 429 U.S. 819 (1976) 42
United States v. *Brown*, 602 F.2d 1073 (2d Cir.), cert. denied, 444 U.S. 952 (1979) 27
United States v. *Bump*, 605 F.2d 548 (10th Cir. 1979) 49
United States v. *Calandra*, 414 U.S. 338 (1974) 9, 10, 32, 49
United States v. *Cefalu*, 338 F.2d 582 (7th Cir. 1964) 39
United States v. *Chanen*, 549 F.2d 1306 (9th Cir.), cert. denied, 434 U.S. 825 (1977) 45
United States v. *Claiborne*, 765 F.2d 784 (9th Cir. 1985), cert. denied, 475 U.S. 1120 (1986) 30
United States v. *Cosby*, 601 F.2d 754 (5th Cir. 1979) 30
United States v. *Crow Dog*, 532 F.2d 1182 (8th Cir. 1976), cert. denied, 430 U.S. 929 (1977) 22
United States v. *DeSapio*, 299 F. Supp. 436 (S.D.N.Y. 1969) 39
United States v. *Dozier*, 672 F.2d 531 (5th Cir.), cert. denied, 459 U.S. 943 (1982) 24
United States v. *Drake*, 494 F.2d 648 (7th Cir. 1974) 37
United States v. *Estepa*, 471 F.2d 1132 (2d Cir. 1972) 22
United States v. *Fields*, 592 F.2d 638 (2d Cir. 1978), cert. denied, 442 U.S. 917 (1979) 27
United States v. *Friedman*, 445 F.2d 1076 (9th Cir.), cert. denied, 404 U.S. 958 (1971) 39
United States v. *Griffith*, 756 F.2d 1244 (6th Cir.), cert. denied, 474 U.S. 837 (1985) 22

Cases – Continued: Page

United States v. *Gullett*, 713 F.2d 1203 (6th Cir. 1983), cert. denied, 464 U.S. 1069 (1984) 38
United States v. *Hasting*, 461 U.S. 499 (1983) 7, 8, 12, 16, 17, 21, 24
United States v. *Hawkins*, 765 F.2d 1482 (11th Cir. 1985), cert. denied, 474 U.S. 1103 (1986) 36
United States v. *Jacobs*, 531 F.2d 87 (2d Cir.), vacated, 429 U.S. 909, on remand, 547 F.2d 772 (2d Cir. 1976), cert. dismissed, 436 U.S. 31 (1978) 22
United States v. *Jones*, 696 F.2d 1069 (4th Cir. 1982) 49
United States v. *Jones*, 766 F.2d 994 (6th Cir.), cert. denied, 474 U.S. 1006 (1985) 30
United States v. *Kelly*, 543 F. Supp. 1303, supp. opinion, 550 F. Supp. 901 (D. Mass. 1982) 25
United States v. *Lane*, 474 U.S. 438 (1986) 13, 17, 21
United States v. *Leighton*, 265 F. Supp. 27 (S.D.N.Y. 1967) 39, 40
United States v. *Librach*, 536 F.2d 1228 (8th Cir.), cert. denied, 429 U.S. 939 (1976) 38
United States v. *Mara*, 410 U.S. 19 (1973) 30
United States v. *Martino*, 825 F.2d 754 (3d Cir. 1987) 22, 28
United States v. *McKenzie*, 678 F.2d 629 (5th Cir.), cert. denied, 459 U.S. 1038 (1982) 21-22
United States v. *Mechanik*, 475 U.S. 66 (1986) 14, 19, 20, 22-23, 42
United States v. *Mitchell*, 777 F.2d 248 (5th Cir. 1985), cert. denied, 476 U.S. 1184 (1986) 36
United States v. *Morrison*, 449 U.S. 361 (1981) 8, 16
United States v. *Murphy*, 768 F.2d 1518 (7th Cir. 1985), cert. denied, 475 U.S. 1012 (1986) 38
United States v. *Nathan*, 816 F.2d 230 (6th Cir. 1987) 22
United States v. *National City Lines, Inc.*, 334 U.S. 573 (1948) 12
United States v. *Nealy*, 729 F.2d 961 (4th Cir. 1984) 35
United States v. *O'Keefe*, 825 F.2d 314 (11th Cir. 1987) .. 22
United States v. *Owen*, 580 F.2d 365 (9th Cir. 1978) 22
United States v. *Page*, 808 F.2d 723 (10th Cir. 1987), cert. denied, No. 86-6848 (June 8, 1987) 36
United States v. *Payner*, 447 U.S. 727 (1980) 13, 21

Cases – Continued: Page

United States v. *Rogers*, 751 F.2d 1074 (9th Cir. 1985) ... 22, 49
United States v. *Sears, Roebuck & Co.*, 719 F.2d 1386 (9th Cir. 1983), cert. denied, 465 U.S. 1079 (1984) 36
United States v. *Sells Engineering, Inc.*, 463 U.S. 418 (1983) 31, 36, 44, 45
United States v. *Serubo*, 604 F.2d 807 (3d Cir. 1979) 27
United States v. *Solomon*, 679 F.2d 1246 (8th Cir. 1982) 22
United States v. *Stanford*, 589 F.2d 285 (7th Cir. 1978), cert. denied, 440 U.S. 983 (1979) 30-31
United States v. *Valenzuela-Bernal*, 458 U.S. 858 (1982) 18
United States v. *Widgery*, 778 F.2d 325 (7th Cir. 1985) .. 15
United States v. *Winter*, 663 F.2d 1120 (1st Cir. 1981), cert. denied, 460 U.S. 1011 (1983) 38
United States v. *Wolfson*, 405 F.2d 779 (2d Cir. 1968), cert. denied, 394 U.S. 946 (1969) 39
United States v. *Wolfson*, 558 F.2d 59 (2d Cir. 1977) 49
United States v. *Zirpolo*, 288 F. Supp. 993 (D.N.J. 1968) 39
Vasquez v. *Hillery*, 474 U.S. 254 (1986) 18, 20
Weatherford v. *Bursey*, 429 U.S. 545 (1977) 18
Young v. *United States ex rel. Vuitton et Fils S.A.*, No. 85-1329 (May 26, 1987) 18

Constitution, statutes and rules:

U.S. Const.:
Amend. IV 16, 17, 19, 21
Amend. V 11, 16, 39, 40, 41
Grand Jury Clause 10
Amend. VI 4, 16, 17, 50
Confrontation Clause 17, 19
Speedy Trial Act of 1974, 18 U.S.C. 3162(a)(2) 25
18 U.S.C. 371 2
18 U.S.C. (1946 ed.) 556 13
18 U.S.C. 1341 2
18 U.S.C. 1503 2

Statutes – Continued: Page

18 U.S.C. 6002 4
18 U.S.C. 6003 4
26 U.S.C. 7206(1) 2
26 U.S.C. 7206(2) 2
28 U.S.C. (1946 ed.) 391 13
28 U.S.C. 2111 ..... 2, 8, 13, 14, 15, 22, 1a
28 C.F.R. 0.39a 24
Fed. R. Crim. P.:
Rule 6 ..... 14, 19, 44
Rule 6(a) 10
Rule 6(b)(2) 10
Rule 6(d) ..... *passim*, 1a
Rule 6(e) 2, 3, 4, 8, 21, 46, 47, 1a-4a
Rule 6(e)(2) 24, 46, 48, 2a
Rule 6(e)(3)(A)(ii) 31, 42, 44, 2a
Rule 6(e)(3)(C)(i) 45, 3a
Rule 6(f) 10
Rule 8(b) 17
Rule 52(a) 2, 8, 13, 14, 15, 20, 22, 4a

Miscellaneous:

B. Gershman, *Prosecutorial Misconduct* (1987) 49
H.R. Rep. 304, 80th Cong., 1st Sess. (1947) 13
H.R. Rep. 308, 80th Cong., 1st Sess. (1947) 13
H.R. Rep. 352, 81st Cong., 1st Sess. (1949) 13
Office of Professional Responsibility, *Ann. Rep. to Att'y Gen.* (1985) 24
R. Traynor, *The Riddle of Harmless Error* (1970) 23
U.S. Dep't of Justice, DOJ Order 1752.1A, *Discipline and Adverse Actions* (Apr. 27, 1981) 24

In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-578

THE BANK OF NOVA SCOTIA, PETITIONER

v.

UNITED STATES OF AMERICA

No. 87-602

WILLIAM A. KILPATRICK, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A41)[1] is reported at 821 F.2d 1456. The opinions of the district court (Pet. App. C1-C55, D1-D35) are reported at 594 F. Supp. 1324 and 575 F. Supp. 325.

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[1] "Pet. App." refers to the appendix to the petition in No. 87-578; "K. Tr." refers to the transcript of the hearing before Judge Kane; "W. Tr." refers to the transcript of the hearing before Judge Winner.

JURISDICTION

The judgment of the court of appeals was entered on June 18, 1987. Petitions for rehearing were denied on August 19, 1987 (Pet. App. B1-B3). The petition for a writ of certiorari in No. 87-578 was filed on October 9, 1987, and the petition in No. 87-602 was filed on October 13, 1987. Both petitions were granted on January 11, 1988, limited to Question One presented by each petition. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE AND RULES INVOLVED

28 U.S.C. 2111 and Rules 6(d), 6(e), and 52(a) of the Federal Rules of Criminal Procedure are set out in an appendix to this brief.

STATEMENT

1. This case stems from a 20-month investigation conducted by two successive grand juries. Two attorneys from the Tax Division of the Department of Justice assisted the grand juries. The attorneys, in turn, were assisted by personnel from the Internal Revenue Service (IRS). In September 1982, a 27-count indictment was returned charging petitioners and others (in various combinations) with conspiracy, in violation of 18 U.S.C. 371; willfully aiding and assisting in the preparation and presentation of false tax returns, in violation of 26 U.S.C. 7206(2); willfully making and subscribing false individual tax returns, in violation of 26 U.S.C. 7206(1); mail fraud, in violation of 18 U.S.C. 1341; and obstruction of justice, in violation of 18 U.S.C. 1503.

The district court initially dismissed all but one of the counts for failure to state an offense. Petitioner Kilpatrick went to trial and was convicted on the one remaining

count (obstruction of justice). The government appealed the dismissal of the other 26 counts. Before argument, the court of appeals granted a defense motion to remand the case to the district court for the purpose of determining whether prosecutorial misconduct during the grand jury proceedings constituted another basis for dismissal. On remand, the district judge granted a new trial to petitioner Kilpatrick on the obstruction of justice count and ordered disclosure of the grand jury transcripts. Because he was retiring from the bench, that district judge did not decide whether the indictment should be dismissed for prosecutorial misconduct; instead, the cases were reassigned to another judge. Pet. App. A2 & n.2, D26-D33.

The newly assigned judge, after conducting a hearing, dismissed all 27 counts of the indictment (Pet. App. A2, C54-C55). The court held that the government had violated Fed. R. Crim. P. 6(e) by disclosing grand jury materials to IRS employees having civil tax enforcement responsibilities (Pet. App. C37-C40), by failing to provide prompt notice to the court of disclosures of grand jury materials (*id.* at C38), by disclosing to potential witnesses the names of targets of the investigation (*id.* at C40-C41), and by instructing two grand jury witnesses that they were not to reveal the fact that they had testified before the grand jury or the substance of their testimony (*id.* at C41). In addition, the court held that the government had violated Fed. R. Crim. P. 6(d) because IRS agents made joint appearances before the grand jury for the purpose of reading transcripts to the jurors (Pet. App. C7-C8, C35-C36).

The court also found that the prosecutors engaged in other forms of improper conduct in the course of the grand jury investigation. The court found that one of the prosecutors was guilty of misconduct when he argued with an expert witness, during a grand jury recess, after the witness had given testimony favorable to the defense (Pet.

App. C33-C34). In addition, the court held that the government violated the witness immunity statute (18 U.S.C. 6002, 6003) by the use of "pocket immunity" or "letters of assurance" (Pet. App. C44-C46). The court also found that the government presented "questionable hearsay" to the grand jury (*id.* at C47), that it improperly called several witnesses for the sole purpose of having them assert their privilege against compelled self-incrimination (*id.* at C46-C47), and that it violated the Sixth Amendment by conducting post-indictment interviews of several high-level employees of the Bank of Nova Scotia without notifying counsel for the Bank (*id.* at C47-C49). The court also found that the independence of the grand jury was compromised because IRS agents were sworn as "agent[s] of the grand jury" (*id.* at C3-C8), and it found that one of the agents gave an inaccurate summary of evidence obtained from other witnesses (*id.* at C25-C30).

The district court held that the indictment should be dismissed because of the Rule 6(d) and (e) violations and because of the "totality of the circumstances" surrounding the grand jury investigation (Pet. App. C54-C55). The court found that the conduct of the government was prejudicial to the defendants because the grand jury "was converted into little more than a rubber stamp" (*id.* at C53-C54). In addition, the court found that, wholly apart from any prejudice, dismissal was appropriate as an exercise of the court's "supervisory authority" (*id.* at C53).

2. The court of appeals reversed the order of dismissal and remanded the case with directions to reinstate all the counts of the indictment (Pet. App. A1-A33). After first concluding that the indictment was legally sufficient (*id.* at A3-A11), the court of appeals reviewed in detail the various grand jury violations found by the district court. The court stated that, based on its review of the record, it was "not persuaded by the several reasons given for the

dismissal" (*id.* at A21). The court noted that the use of summaries of evidence is "permissible and often helpful, especially in complicated cases such as this" (*ibid.*); it stated that the use of "informal immunity" was "entirely proper" and that, in any event, "the defendants have failed to show how the use of informal immunity prejudiced the grand jury" (*id.* at A22 (footnote and citation omitted)); and it held that the government's post-indictment questioning of bank employees "could not possibly have affected the grand jury's charging decision" (*ibid.*). The court also held that the presence of more than one IRS agent in the grand jury room for the purpose of reading transcripts, while it violated Rule 6(d), did not warrant dismissal of the indictment because it did not prejudice the defendants (Pet. App. A22-A23).[2]

In addition, the court of appeals found no support for the district court's conclusion that government attorneys " 'relinquished to the IRS their responsibility to determine the persons to whom disclosure would be made' " (Pet. App. A23 (quoting district court opinion)) or its conclusion that IRS agents "manipulated the grand jury" in order to "obtain materials for [use in] civil litigation" (*ibid.*). The court also noted that, "[a]ssuming that [the] allegation" of improper disclosure of grand jury materials to civil IRS agents "finds support in the record," the grand jury's independence was not "usurped in such a significant way as to amount to grand jury abuse" (*id.* at A24 (citation omitted)). In addition, the court observed that "[t]he aid of IRS experts was essential to a complete understanding of the case" and that "[t]he fact that some of the IRS personnel assigned to the grand jury investigation were from

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[2] The court acknowledged the district court's finding that IRS agents had convened grand jury sessions without government attorneys being present, but it held that the finding on that issue was "not supported by the record" (Pet. App. A23 n.14).

the civil division is by itself not sufficient to show grand jury abuse" (*ibid.*). The court cited the grand jury's return of a multi-count indictment as "probative evidence that it was not abused to obtain evidence for civil purposes" (*id.* at A25 (footnote omitted)).

The court of appeals also held that the grand jury's independent judgment was not impaired by the disclosure of the identity of the targets of the investigation to various potential witnesses or by the unauthorized instructions of secrecy that were given to two witnesses at the time they testified before the grand jury (Pet. App. A25). Regarding the term "agents of the grand jury" that was applied to certain IRS agents, the court – without deciding whether the use of that term was improper – found that its use did not prejudice the defendants (*id.* at A25-A26). Similarly, the court found dismissal of the indictment was not justified on the ground that several witnesses who intended to invoke the privilege against compelled self-incrimination were called before the grand jury. The court noted that the witnesses' expression of an intention to invoke the privilege "cannot be transformed into a prohibition against inquiry" and that "[o]nce the privilege was invoked on the [r]ecord, the prosecutors discontinued all questioning" (*id.* at A26-A27 (footnote omitted)). And the court found that an incident in which one of the prosecutors engaged in an argument with an expert witness during a grand jury recess, while unjustifiable, did not affect the grand jury's independence (*id.* at A27).

The court noted that a "presumption of regularity • • • attaches to grand jury proceedings" (Pet. App. A27 (citation omitted)), and it found that petitioners had failed to overcome that presumption. It observed that the grand jury transcripts revealed "an active, independent, and questioning grand jury, familiar with the record, one that thoughtfully questioned, rather than submitted to statements and suggestions of the Government attorneys" (*id.*

at A27-A28 & n.20 (citing numerous examples)). In addition, the court pointed out that, as reflected in the grand jury transcripts, "the prosecutors frequently reminded the grand jury of its independence and duty to make its own assessment of the evidence introduced before it" (*ibid.* (quoting examples)). The court noted that "[t]he district court erred in focusing primarily on the propriety of the Government's conduct rather than on possible interference with the integrity and independence of the grand jury" (*id.* at A27-A28).

Finally, the court of appeals held that "the drastic remedy of dismissal of an indictment, whether premised on due process or supervisory powers theories," could not be ordered in the absence of a "significant infringement on the grand jury's ability to exercise independent judgment" (Pet. App. A32 (footnote omitted)). The court noted that, in *United States* v. *Hasting*, 461 U.S. 499, 509 (1983), this Court made clear that "errors that are harmless, including most constitutional violations," must be ignored (Pet. App. A32 (footnote omitted); see also *id.* at A32 & n.23).

Judge Seymour dissented (Pet. App. A34-A41). In her view, a showing of prejudice to the defense is not required in order for a court to dismiss an indictment on the basis of its supervisory powers (*id.* at A36-A40). She concluded that on the facts of this case, "the district court was within its discretion in exercising its supervisory power to protect the integrity of the judicial process and to deter illegal conduct" (*id.* at A40-A41 (citing *Hasting*, 461 U.S. at 505)).

SUMMARY OF ARGUMENT

1. The issue in this case is whether a district court may dismiss an indictment, in the exercise of its supervisory powers, for alleged grand jury abuse that has not affected the grand jury's charging decision. This question must be

answered in the negative for several reasons. First, dismissal of an indictment in the absence of prejudice would violate the rule that "[a]n indictment returned by a legally constituted and unbiased grand jury, • • • if valid on its face, is enough to call for a trial on the merits." *Costello* v. *United States*, 350 U.S. 359, 363 (1956). Second, under 28 U.S.C. 2111 and Fed. R. Crim. P. 52(a), federal courts are required to disregard errors that do not affect substantial rights. A court cannot ignore those provisions simply by invoking its supervisory authority. Third, this Court has made clear in a variety of contexts that errors that are nonprejudicial—even constitutional errors—do not warrant dismissal of an indictment or reversal of a conviction. See, *e.g.*, *United States* v. *Hasting*, 461 U.S. 499 (1983); *United States* v. *Morrison*, 449 U.S. 361 (1981). The principles established in those cases are fully applicable here, since the errors in this case, for the most part, are simply procedural violations of Fed. R. Crim. P. 6(d) and (e). Finally, a rule authorizing dismissal of an indictment in the absence of prejudice would be unsound as a policy matter. Such a rule would exact substantial costs, particularly when the indictment stems from a lengthy and complex investigation. The objective of deterring governmental misconduct can be achieved as effectively, if not more so, in other less drastic ways, such as by disciplining the prosecutors who engaged in the misconduct. Furthermore, absent a requirement of prejudice, the courts would lack concrete standards to apply in deciding whether to dismiss an indictment. The result of adopting petitioners' position would be to provoke pretrial litigation and produce disparate, ad hoc judgments among courts as to when to dismiss indictments because of grand jury abuse. In short, there is no sound legal or policy basis to justify dismissing an indictment where the defendant has not been prejudiced.

2. Even if dismissal of an indictment were appropriate in the absence of prejudice, dismissal would not be warranted here. To begin with, there is no evidence that the misconduct found in this case is symptomatic of a longstanding problem involving other prosecutors and other cases. Thus, the exercise of supervisory authority is not necessary to deter widespread abuse. Moreover, apart from the isolated errors that were committed, the record shows that the prosecutors in this case acted fairly and professionally. The record further shows that the grand jury was active and inquisitive, and that it retained its independent role throughout the investigation. Finally, as we demonstrate below, petitioners greatly exaggerate the seriousness of the alleged errors. In some instances the claims of error involve conduct that is entirely lawful. In the other instances, the errors constitute at worst oversights or exercises of poor judgment by the prosecutors, rather than deliberate efforts to undermine the integrity of the grand jury. In the context of a 20-month investigation, those errors do not warrant the extreme sanction of dismissal of the indictment.

ARGUMENT

I. AN INDICTMENT MAY NOT BE DISMISSED FOR GRAND JURY ABUSE IN THE ABSENCE OF PREJUDICE TO THE DEFENDANT

A. A Facially Valid Indictment Is Ordinarily Immune From Challenge Based On Alleged Defects In The Grand Jury Process

In *Costello* v. *United States*, 350 U.S. 359, 363 (1956), this Court stated that "[a]n indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for a trial on the merits." See also *United States* v. *Calandra*, 414 U.S. 338, 344-345 (1974); *Lawn* v. *United States*, 355 U.S. 339, 349 (1958); *Beavers* v. *Henkel*, 194 U.S. 73, 84-85 (1904); *Bracy* v. *United States*, 435 U.S.

1301, 1303 (1978) (Rehnquist, Circuit Justice). The Court in *Costello* held that the Grand Jury Clause of the Fifth Amendment does not require that a defendant be permitted to challenge an indictment on the ground that the evidence before the grand jury was inadequate or incompetent. In addition, the Court refused to invoke its supervisory powers to dismiss the indictment on that ground. To accept such arguments, the Court held, would "run counter to the whole history of the grand jury institution, in which laymen conduct their inquiries unfettered by technical rules" (350 U.S. at 364).

The *Costello* rule reflects two fundamental considerations. The first is that the grand jury plays a discrete and limited role in the criminal justice system. A grand jury investigation is simply a preliminary step in the prosecution process, a screening mechanism to determine whether there is a sufficient basis to require the suspect to stand trial before a petit jury. See *Calandra*, 414 U.S. at 343-344, 349.

In contrast to a criminal trial, with its array of procedural and evidentiary safeguards, a grand jury investigation is a much less formal proceeding, and it is not patterned on the traditional adversary process. The grand jury conducts its investigation ex parte and receives evidence only from the prosecutor; neither the suspect nor his attorney is entitled to appear before the grand jury to testify or present evidence, to cross-examine witnesses, or otherwise to rebut the prosecutor's presentation. See *Calandra*, 414 U.S. at 343-344. The rules of evidence do not apply, and the grand jury is free to consider hearsay or other incompetent evidence as well as evidence that was illegally obtained. *Id.* at 345; *Costello*, 350 U.S. at 363. The standard governing the grand jury's deliberations is probable cause, not proof beyond a reasonable doubt, and an indictment may be returned if a bare majority of the grand jurors concur. See Fed. R. Crim. P. 6(a), (b)(2), (f). Thus,

in addition to its role as an investigative body, the grand jury serves as a flexible and informal device to screen out, at the beginning of the criminal process, those cases in which further proceedings are unwarranted. The informality and limited role of the grand jury in addressing the question of guilt distinguishes the grand jury process sharply from the trial before the petit jury, at which the issue of guilt or innocence is decided.

The second factor underlying the *Costello* rule is the recognition that, in light of the nature and function of the grand jury, it would impose significant and unjustified costs on the criminal justice system to subject indictments to searching pretrial scrutiny and allow them to be dismissed for procedural irregularity. Litigation over issues of grand jury irregularities would entail a substantial expenditure of prosecutorial and judicial resources and would impede the prompt adjudication of the central question in the case—the defendant's guilt or innocence. See *Costello*, 350 U.S. at 363. And to dismiss a prosecution and require that the government seek a new indictment not only entails delay, but in complex cases such as this one it can result in a costly and onerous process of representing a large quantity of evidence to a new grand jury.

Because the Court in *Costello* had before it only the question whether hearsay evidence alone could support a grand jury indictment, the Court did not have to address the question whether an indictment could ever be dismissed for flagrant abuses that so distorted the grand jury's role that the defendant was in effect deprived of his Fifth Amendment right to be indicted by a grand jury. At the least, however, *Costello* sets the framework for that inquiry. It makes clear that if dismissal of an indictment for grand jury abuse is ever appropriate, it cannot be based on mere technical errors or errors involving evidentiary insufficiency. It must be based on conduct that so thoroughly

distorts the grand jury process as to make it clear that the grand jury has failed to perform its constitutional role. Thus, under the principles of *Costello*, dismissal of an indictment cannot be ordered in the absence of a clear showing of prejudice to the defendants.

B. Dismissal Of An Indictment In The Absence Of Prejudice Would Conflict With 28 U.S.C. 2111 and Fed. R. Crim. P. 52(a)

Petitioners argue that the district court was entitled to dismiss the indictment in this case in the exercise of its supervisory power and that the court of appeals should have affirmed the dismissal order on that ground. To be sure, federal courts are authorized, within limits, to "formulate procedural rules not specifically required by the Constitution or the Congress." *United States* v. *Hasting*, 461 U.S. 499, 505 (1983). A court's invocation of its supervisory power, however, is subject to important limitations. One of the most significant is that a court may not devise a rule in the exercise of its supervisory authority if that rule would conflict with some other binding provision of law. As this Court recently stated, "[e]ven a sensible and efficient use of the supervisory power * * * is invalid if it conflicts with constitutional or statutory provisions." *Thomas* v. *Arn*, 474 U.S. 140, 148 (1985). Accord *Palermo* v. *United States*, 360 U.S. 343, 353 n.11 (1959) ("The power of this Court to prescribe rules of procedure and evidence for the federal courts exists only in the absence of a relevant Act of Congress."); *United States* v. *National City Lines, Inc.*, 334 U.S. 573, 589 (1948) ("[O]ur general power to supervise the administration of justice in the federal courts * * * does not extend to disregarding a validly enacted and applicable statute or permitting departure from it."). The principle that federal courts, acting pursuant to their supervisory powers, may not override congressional policies is obviously a sound one. A contrary principle " 'would confer on the judiciary discretionary power to disregard the considered limitations of the law it is charged with enforcing.' " *Thomas*, 474 U.S. at 148 (quoting *United States* v. *Payner*, 447 U.S. 727, 737 (1980)).

Permitting a district court to dismiss an indictment in the absence of prejudice—or an appellate court to affirm such a dismissal—would be inconsistent with 28 U.S.C. 2111 and Fed. R. Crim. P. 52(a). Section 2111 provides that an appellate court "shall give judgment * * * without regard to errors or defects which do not affect the substantial rights of the parties." Rule 52(a) provides that "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." Both provisions reflect Congress's judgment that prejudice is an essential prerequisite to granting relief in a criminal case.[3]

[3] Although Rule 52(a) is a court rule and has never formally been enacted by Congress, it is clear that Congress intended for that rule to govern harmless error questions and that the rule states congressional policy regarding the principles of harmless error. See *United States* v. *Lane*, 474 U.S. 438, 454-455 (1986)] (Brennan, J., concurring in part and dissenting in part). Rule 52(a) was designed to take the place of two statutory provisions, 18 U.S.C. (1946 ed.) 556 and 28 U.S.C. (1946 ed.) 391. When Congress revised both the Criminal Code and the Judicial Code several years later, it relied on Rule 52(a) as the reason for repealing the two predecessor statutes so as to avoid redundancy. See H.R. Rep. 304, 80th Cong., 1st Sess. 8 (1947) ("effect was given to the changes [made by the Federal Rules of Criminal Procedure] by revising modified sections and repealing superseded provisions"); H.R. Rep. 308, 80th Cong., 1st Sess. A236 (1947) (former Section 391 is "superseded by Rule 61 of said Civil Rules, and Rule 52 of said Criminal Rules"). The following year, Congress enacted 28 U.S.C. 2111 to ensure that the harmless error provisions applicable to the district courts through the Civil and Criminal Rules would be applicable to appellate courts as well. See H.R. Rep. 352, 81st Cong., 1st Sess. 18 (1949).

As this Court has made clear, 28 U.S.C. 2111 and Rule 52(a) apply not only to errors occurring at trial, but also to errors occurring before the grand jury. Thus, in *United States* v. *Mechanik*, 475 U.S. 66, 71-72 (1986), the Court stated that "[w]e see no reason not to apply [Rule 52(a)] to 'errors, defects, irregularities, or variances' occurring before a grand jury just as we have applied it to such error occurring in the criminal trial itself." The Court held that the defendant's conviction at trial rendered harmless the violation of Fed. R. Crim. P. 6(d) that occurred in that case (475 U.S. at 72-73). In her concurring opinion in *Mechanik*, Justice O'Connor, joined by Justices Brennan and Blackmun, expressed complete agreement with the majority's ruling that Rule 52(a) applies to violations of Rule 6.[4] In reaching that conclusion, Justice O'Connor reviewed the history of Rule 52(a). She noted (475 U.S. at 75) that "[t]he Advisory Committee's notes to Rule 52(a) state that '[t]his rule is a restatement of existing law,' which specifically provided for a harmless error analysis of objections going to the validity of the indictment in 18 U.S.C. § 556 (1946 ed.)." She further pointed out (475 U.S. at 75) that "[t]he language of Rule 6 does not exempt the Rule from a harmless error scrutiny" and that, to the contrary, the commentary to Rule 6 expressly confirms "the rulemakers' intent that violations of Rule 6(d) would be among those errors subject to harmless error review."

Petitioners appear to recognize that a court may not exercise its supervisory power if to do so would violate Congress's intent. Thus, the Bank of Nova Scotia asserts that

[4] Justice O'Connor's disagreement with the majority was over whether the Rule 52(a) inquiry should focus on the petit jurors' verdict or on the grand jury's charging decision. In her view, the focus should be on the grand jury's charging decision, regardless of whether there has been a conviction (475 U.S. at 76).

"[t]here is no doubt that Congress intended that the dismissal sanction be employed in appropriate situations for misconduct before the grand jury" (Br. 37 n. 28). See also *id.* at 36 (noting that "[d]ismissal implements the essential rules established by Congress and this Court for the administration of proceedings before federal grand juries"). Yet neither petitioners nor amici explain how the position they urge—*i.e.*, that dismissal of an indictment is appropriate even in the absence of prejudice (Kilpatrick Br. 7-26; Bank Br. 30-42; ACLU Br. 5-35; NACDL Br. 6-27)—can be reconciled with 28 U.S.C. 2111 and Rule 52(a).

At bottom, petitioners' argument consists of reasons why, in their view, requiring proof of prejudice in connection with grand jury misconduct would be unwise as a matter of policy. While we disagree with petitioners' analysis of the policy issues (see pages 22-26, *infra*), the flaw in their argument is that, as 28 U.S.C. 2111 and Rule 52(a) demonstrate, Congress and this Court have already weighed those policy considerations and have decided that errors that have not prejudiced a defendant should not provide a basis for dismissing an indictment. See generally *United States* v. *Widgery*, 778 F.2d 325, 329 (7th Cir. 1985). A court—whether acting pursuant to its supervisory authority or otherwise—has no authority to disregard that determination.

C. This Court's Decisions Compel The Conclusion That An Indictment May Not Be Dismissed For Procedural Irregularities In The Grand Jury In The Absence Of Prejudice

Wholly apart from 28 U.S.C. 2111 and Fed. R. Crim. P. 52(a), this case is controlled by numerous decisions of this Court holding that nonprejudicial errors must be disregarded. Those decisions, several of which require a harmless error analysis even of constitutional violations, cannot be meaningfully distinguished from the present case.

For example, in *United States* v. *Morrison*, 449 U.S. 361 (1981), the Court held that an indictment should not be dismissed because of a violation of the Sixth Amendment right to counsel that did not result in prejudice to the defendant. In *Morrison*, the court of appeals set aside the defendant's conviction and dismissed the indictment, without any showing of prejudice, because government agents had intentionally sought to undermine the defendant's relationship with her attorney. This Court reversed, holding that because the violation had no effect on the criminal proceedings, the remedy fashioned by the lower court was inappropriate. The Court reasoned that "[t]he remedy in the criminal proceeding is limited to denying the prosecution the fruits of its transgression" (*id.* at 366). According to the Court, "absent demonstrable prejudice, or substantial threat thereof, dismissal of the indictment is plainly inappropriate, even though the violation may have been deliberate" (*id.* at 365 (footnote omitted)). The Court further noted (*id.* at 365-366) that the requirement of prejudice applies not only in the Sixth Amendment context, but also in the Fourth and Fifth Amendment contexts.[5]

In *United States* v. *Hasting, supra*, the Court held that a court may not use its supervisory power to reverse a conviction based on a prosecutor's improper comment on the

[5] The dissenting judge below stated that this Court in *Morrison* indicated that "a showing of prejudice is not required when the record reveals 'a pattern of recurring violations' " (Pet. App. A40 (quoting 449 U.S. at 366 n.2)). In fact, the Court left that issue open; it simply noted that "the record before us does not reveal a pattern of recurring violations by investigative officers that *might* warrant the imposition of a more extreme remedy in order to deter further lawlessness" (*ibid.* (emphasis added)). In any event, that language strongly suggests that, if dismissal is ever warranted in the absence of prejudice, there must be a history of misconduct, not simply isolated violations in a single case. As discussed on pages 26-27, *infra*, under that standard, dismissal is inappropriate in the present case.

defendant's failure to testify if the error is harmless. The Court noted (461 U.S. at 506) that "[s]upervisory power to reverse a conviction is not needed as a remedy when the error to which it is addressed is harmless since, by definition, the conviction would have been obtained notwithstanding the asserted error." The Court stressed that it "has consistently made clear that it is the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless, including most constitutional violations" (*id.* at 509). In addition, the Court observed that "deterrence is an inappropriate basis for reversal" where the prosecutor's violation is "attenuated" and "where means more narrowly tailored to deter objectionable prosecutorial conduct are available," such as disciplinary proceedings or "publicly chastis[ing] the prosecutor by identifying him in [a judicial] opinion" (*id.* at 506 & n.5).[6]

[6] This Court has held numerous other errors to be subject to harmless error analysis. See, *e.g.*, *Pope* v. *Illinois*, No. 85-1973 (May 4, 1987), slip op. 4-7 (erroneous jury instruction); *Rose* v. *Clark*, 478 U.S. 570 (1986) (same); *Delaware* v. *Van Arsdall*, 475 U.S. 673, 681-684 (1986) (violation of Confrontation Clause); *United States* v. *Lane*, *supra* (misjoinder under Fed. R. Crim. P. 8(b)); *Rushen* v. *Spain*, 464 U.S. 114, 117-120 (1983) (right to be present at trial); *Moore* v. *Illinois*, 434 U.S. 220, 222 (1977) (admission of identification obtained in violation of right to counsel); *Milton* v. *Wainwright*, 407 U.S. 371, 372-373 (1972) (admission of confession in violation of the Sixth Amendment); *Chambers* v. *Maroney*, 399 U.S. 42, 52-53 (1970) (admission of evidence obtained in violation of the Fourth Amendment); *Coleman* v. *Alabama*, 399 U.S. 1, 10-11 (1970) (denial of right to counsel at a preliminary hearing); *Harrington* v. *California*, 395 U.S. 250, 254 (1969) (improper admission of statement of nontestifying co-defendant); *Chapman* v. *California*, 386 U.S. 18 (1967) (comments and instructions on a defendant's silence); cf. *United States* v. *Bagley*, 473 U.S. 667, 681-684 (1985) (opinion of Blackmun, J.), and *id.* at 685 (White, J., concurring in part and dissenting in part) (failure to disclose exculpatory material is reversible error only if there is reasonable probability that the material would have affected the outcome of the trial); *Strickland* v. *Washington*, 466 U.S. 668, 694 (1984) (to prevail on a claim of ineffective assistance of

To be sure, this Court has dispensed with harmless error analysis in the case of certain types of errors, but those situations are plainly "the exception and not the rule." *Rose* v. *Clark*, 478 U.S. at 578. Recent decisions of this Court leave no doubt that courts must apply the harmless error doctrine where an error, even a constitutional one, is susceptible to meaningful harmless error analysis, does not necessarily render the factfinding process fundamentally unfair, and does not involve a right that protects fundamental values unrelated to the factfinding process. See *id.* at 576-579; compare *Young* v. *United States ex rel. Vuitton et Fils S.A.*, No. 85-1329 (May 26, 1987), slip op. 21-26 (plurality opinion) (appointment of interested prosecutor raised doubt that prosecution could be conducted in disinterested manner, created appearance of impropriety to which harmless error analysis would not have been sensitive, and did not lend itself to ready assessment of its effects on the prosecution); *Vasquez* v. *Hillery*, 474 U.S. 254, 260-264 (1986) (racial discrimination in selection of grand jurors struck at fundamental values of judicial system and society, and was not susceptible to evaluation of resulting harm); see generally *Chapman*, 386 U.S. 18, 23 & n.8 (1967). Exceptions to the harmless error rule are rare and must be based on extraordinary circumstances. As this Court recently stated, "if the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that *any* other errors that may have

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counsel, a defendant must show reasonable probability that, but for counsel's errors, the result of the proceeding would have been different); *United States* v. *Valenzuela-Bernal*, 458 U.S. 858, 873-874 (1982) (showing of prejudice required where the government deported potential witnesses before they could testify for the defendant); *Weatherford* v. *Bursey*, 429 U.S. 545, 554-557 (1977) (defendant's right to counsel not infringed where attorney-client information obtained by government informant had no effect on trial).

occurred are subject to harmless error analysis" (*Rose* v. *Clark*, 478 U.S. at 579 (emphasis added)).

The conduct at issue here plainly falls within the general rule requiring a harmless error evaluation. There is simply no reason why the alleged misconduct here—procedural violations, primarily of Fed. R. Crim. P. 6—should be given a preferred status over such errors as improper comments on a defendant's silence, erroneous jury instructions, violations of the Confrontation Clause, admission of evidence in violation of the Fourth Amendment, misjoinder, or the myriad other errors that this Court has held to be subject to harmless error analysis (see note 6, *supra*). The errors involved in this case are in no way comparable to the limited class of errors that are not subject to harmless error analysis, such as racial discrimination in the selection of grand jurors or the complete denial of the right to counsel at trial. Rather, as the court of appeals recognized (Pet. App. A16-A33), the conduct at issue in this case consisted of discrete acts whose nature and potential impact were ascertainable from grand jury transcripts and testimony at the hearings in the district court. See, *e.g.*, *Mechanik*, 475 U.S. at 78-79 (O'Connor, J., concurring in judgment) (issue of whether simultaneous appearance of two witnesses in the grand jury was harmless could be resolved by reviewing pertinent grand jury transcripts).[7]

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[7] Contrary to the ACLU's contention (ACLU Br. 3 n.2), this Court in *Mechanik* did *not* leave open the question whether errors at the grand jury stage that have not prejudiced the defendant may justify dismissal of an indictment. The Court's analysis in *Mechanik* is fully consistent with the Court's many other decisions holding that a defendant is not entitled to relief for nonprejudicial errors. In *Mechanik*, the Court rejected the proposition that a violation of Rule 6(d) requires automatic reversal of a subsequent conviction and dismissal of an indictment in the absence of prejudice. While the dismissal in *Mechanik* was ordered after trial, both the majority and

Finally, unlike conduct such as racial discrimination in the selection of grand jurors, the conduct at issue in this case does not " 'strike[] at the fundamental values of our judicial system and our society as a whole' " (*Vasquez*, 474 U.S. at 262 (citation omitted)). In *Mechanik*, the Court explicitly stated that the considerations expressed in *Vasquez* "have little force outside the context of racial discrimination in the composition of the grand jury" (475 U.S. at 71 n.1). According to the Court (*ibid.*), "[n]o long line of precedent requires the setting aside of a conviction based on a rule violation in the antecedent grand jury proceedings, and the societal interest in deterring this sort of error does not rise to the level of the interest in deterring racial discrimination." In light of *Mechanik*, it is apparent that petitioners cannot overcome the "strong presumption" (*Rose* v. *Clark*, 478 U.S. at 579) that the alleged errors here are subject to harmless error inquiry.[8]

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concurring opinions suggested that, even in the pretrial setting, a showing of prejudice is required before an indictment may be dismissed. Early in its opinion, the majority "assume[d] for the sake of argument" that a violation of Rule 6(d) would have permitted the district court to dismiss portions of the indictment "*had there been actual prejudice* and had the matter been called to its attention before the commencement of the trial" (475 U.S. at 69-70 (emphasis added)). At the end of its opinion, the Court stated that it was "express[ing] no opinion as to what remedy may be appropriate for a violation of Rule 6(d) *that has affected the grand jury's charging decision* and is brought to the attention of the trial court before the commencement of trial" (475 U.S. at 72 (emphasis added; footnote omitted)). Thus, the question left open in *Mechanik* was *not* whether dismissal would be appropriate prior to trial in the absence of prejudice, but whether dismissal prior to trial is appropriate even when there *has* been prejudice. See also 475 U.S. at 75 (O'Connor, J., concurring in judgment) (recognizing that dismissal of an indictment is a "drastic remedy" that, under Fed. R. Crim. P. 52(a), is "appropriate only when a violation has impaired the substantial rights of the accused").

[8] Petitioners devote considerable attention (Kilpatrick Br. 26-45) to their claim that the court of appeals erred in finding that the alleged misconduct was not prejudicial. According to petitioners (*ibid.*), the errors in question were not harmless beyond a reasonable doubt. In the first place, however, that argument addresses the issue on which this Court did not grant certiorari (Question 2), *i.e.*, whether the court of appeals erred in holding that the errors were not prejudicial. In any event, petitioners' claim is without merit. The harmless beyond a reasonable doubt standard applies only to constitutional errors. The errors alleged in the present case, by contrast, involve primarily procedural violations of Fed. R. Crim. P. 6(d) and (e). See *Lane*, 474 U.S. at 446 n.9; compare *Chapman*, 386 U.S. at 24, with *Kotteakos* v. *United States*, 328 U.S. 750, 765 (1946).

Just as a lower court may not avoid the effect of a statute or court rule by invoking the supervisory power, it may not avoid the effect of this Court's precedents by the same device. In *United States* v. *Payner*, *supra*, the Court held that a judge may not suppress evidence in a defendant's case based on an illegal search of a third party, even when the judge bases his decision on his supervisory authority. In reaching its decision, the Court indicated that the conclusion was compelled by its cases interpreting the Fourth Amendment (447 U.S. at 731-732), and that "[t]he values assigned to the competing interests do not change because a court has elected to analyze the question under the supervisory power instead of the Fourth Amendment" (*id.* at 736). The logic of that rule is clear: if a court could dismiss an indictment or reverse a conviction for harmless error merely by invoking its supervisory authority, this Court's numerous harmless error decisions would be rendered meaningless. Such a rule, at bottom, would give lower courts "discretionary power to disregard" decisions of this Court with which they do not agree (*id.* at 737). Plainly, "the supervisory power does not extend so far" (*ibid.*); accord, *Hasting*, 461 U.S. at 506-507.[9]

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[9] The vast majority of the circuits that have addressed the issue agree that an indictment may not be dismissed for procedural irregularities in the grand jury (or other instances of governmental misconduct) in the absence of prejudice. See, *e.g.*, *United States* v.

D. Dismissal Of An Indictment For Procedural Defects In The Grand Jury Investigation That Do Not Affect The Grand Jury's Charging Decision Would Be Unsound As A Matter Of Policy

In addition to violating 28 U.S.C. 2111, Rule 52(a), the principles of *Costello*, and this Court's decisions regarding harmless error, a rule allowing the dismissal of an indictment in the absence of prejudice would be unsound as a matter of policy. An analysis of the competing policy considerations demonstrates that where the defendant has not been prejudiced, the public interest is disserved by the dismissal of an indictment.

In *Mechanik*, this Court identified a number of costs associated with the reversal of a criminal conviction: (1) it forces jurors, witnesses, courts, and the parties to expend further time, energy, and other resources to repeat the trial; (2) the loss of memory and disappearance of witnesses may make retrial more difficult, if not impossible; and (3) even if a defendant is convicted on retrial, the resulting delay undermines the goals of deterrence, rehabilitation, and the prompt administration of justice. 475

McKenzie, 678 F.2d 629, 631 (5th Cir.) (requiring a showing of prejudice "even in the case of 'egregious prosecutorial misconduct' " (citation omitted)), cert. denied, 459 U.S. 1038 (1982); *United States* v. *Nathan*, 816 F.2d 230, 234 (6th Cir. 1987); *United States* v. *Griffith*, 756 F.2d 1244, 1249 (6th Cir.), cert. denied, 474 U.S. 837 (1985); *United States* v. *Solomon*, 679 F.2d 1246, 1250-1251 (8th Cir. 1982); *United States* v. *Crow Dog*, 532 F.2d 1182, 1196-1197 (8th Cir. 1976), cert. denied, 430 U.S. 929 (1977); *United States* v. *Rogers*, 751 F.2d 1074, 1077 (9th Cir. 1985); *United States* v. *Owen*, 580 F.2d 365, 367-368 (9th Cir. 1978); *United States* v. *O'Keefe*, 825 F.2d 314, 318 (11th Cir. 1987); cf. *United States* v. *Martino*, 825 F.2d 754, 759-760 (3d Cir. 1987) (stating that, notwithstanding some of the language in earlier cases, the Third Circuit has in fact "looked to prejudice" in "every case"). Contra, *United States* v. *Jacobs*, 531 F.2d 87 (2d Cir.), vacated, 429 U.S. 909, on remand, 547 F.2d 772 (2d Cir. 1976), cert. dismissed, 436 U.S. 31 (1978); *United States* v. *Estepa*, 471 F.2d 1132 (2d Cir. 1972).

U.S. at 72. Contrary to petitioners' contention (Kilpatrick Br. 26), those costs are not avoided simply because a dismissal occurs *before* trial, particularly when the grand jury investigation is a lengthy and complex one, as was the case here. When an indictment is dismissed, the case must be presented to a new grand jury. And while some testimony from the first proceeding can be read to (or summarized for) the second grand jury, a prosecutor will often feel compelled, at least in a complex case, to let the grand jury hear from some witnesses in person, so that the grand jurors may ask questions and make credibility determinations. The presentation of the case to a new grand jury consumes the time of prosecutors, witnesses, and grand jurors. In addition, it necessarily postpones the trial, thus delaying the administration of justice and increasing the likelihood that witnesses will disappear or that their memories will fade. And if the defendant is ultimately convicted, the goals of deterrence and rehabilitation will be undermined by the delay.

In addition, a rule sanctioning the dismissal of an indictment in the absence of prejudice would almost certainly generate considerable litigation, particularly in cases involving lengthy and complex investigations. The possibility of some imperfection in a grand jury proceeding is not difficult to allege. Litigation regarding such allegations would entail a substantial expenditure of prosecutorial and judicial resources and would impede the prompt adjudication of the central question in the case – the defendant's guilt or innocence. See generally *Costello* v. *United States*, 350 U.S. at 363-364. Moreover, the absence of a requirement of prejudice would eliminate a defendant's need to explain how an alleged error was prejudicial. Hearings would thus be required not only in cases involving a likelihood of prejudice, but in many other cases as well. Cf. R. Traynor, *The Riddle of Harmless Error* 50 (1970) (footnote omitted) ("Reversal for error, regardless of its

effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it.").

Petitioners and amici claim that dismissal in the absence of prejudice is necessary to deter prosecutorial misconduct (see Kilpatrick Br. 9; Bank Br. 38; ACLU Br. 18-23; NACDL Br. 21-27). However, remedies other than dismissal of the indictment are available to ensure compliance with grand jury procedural requirements. For example, Fed. R. Crim. P. 6(e)(2) specifically states that "[a] knowing violation of Rule 6 may be punished as a contempt of court." See *United States* v. *Dozier*, 672 F.2d 531, 545 (5th Cir.), cert. denied, 459 U.S. 943 (1982). Other sanctions that a court has available in cases of proved prosecutorial misconduct include directing the prosecutor to show cause why he should not be disciplined, requesting the Department of Justice to initiate disciplinary proceedings against the prosecutor,[10] reporting the prosecutor's conduct to the disciplinary committee of the bar of which he is a member, or chastising the prosecutor in a public judicial opinion. See generally *Hasting*, 461 U.S. at 506 n.5. Because these alternatives focus on the person responsible for the improper conduct and do not impose unjustified costs on the criminal justice

[10] The Department of Justice has established procedures for investigating alleged misconduct by federal prosecutors. Department regulations establish penalties for the violation of rules governing official conduct that range in severity from an official reprimand for a single instance of minor misconduct to removal from office for serious offenses or repeated acts of misconduct. See U.S. Dep't of Justice, DOJ Order 1752.1A, *Discipline and Adverse Actions* ch. 2 & app. 1 (Apr. 27, 1981). The Attorney General has established an Office of Professional Responsibility (OPR) for the purpose of investigating allegations of unethical conduct by Department attorneys and other personnel. See 28 C.F.R. 0.39a. During 1985, the year after the dismissal of the indictment in this case, OPR completed 278 investigations of complaints involving alleged misconduct by Department of Justice employees. See OPR, *Ann. Rep. to Att'y Gen.* (1985), at 3-5; see *id.* at 6-7 (discussing specific examples).

system, they are plainly preferable to the remedy of dismissal. See generally *United States* v. *Kelly*, 543 F. Supp. 1303, 1314, supp. opinion, 550 F. Supp. 901 (D. Mass. 1982).

Where, as in this case, the errors did not affect the grand jury's charging decision, dismissal of the indictment in the absence of prejudice would be an exercise in futility. If the errors in the grand jury proceeding did not affect the first grand jury's charging decision, it logically follows that, absent some unusual circumstance, another grand jury will hand down an indictment as well.[11] In such cases, the whole process of dismissal and reindictment would accomplish very little except for delay.[12] In contrast, where prejudice *has* occurred, dismissal is more likely to have a meaningful effect on the disposition of the case, because of the prospect that a new grand jury, not exposed to the

[11] As we have discussed (pages 9-12, *supra*), under the *Costello* rule, an indictment may not be dismissed unless an error has so profoundly tainted the grand jury process as to render the charging document in effect something other than the "indictment of a Grand Jury" (U.S. Const. Amend. V). Under *Costello*, there may be circumstances in which dismissal is not appropriate even where there *has* been an effect on the grand jury's charging decision. No such issue is presented here, however, since the court of appeals viewed this case as one in which the errors did *not* affect the grand jury's decision to indict (see Pet. App. A18 & n.9, A22; see also *id.* at A39 (dissenting opinion)).

[12] To be sure, the prospect of having to reindict a case – an inconvenient and often time-consuming task – will provide some deterrence when a prosecutor is otherwise deliberately inclined to commit error. Cf. Speedy Trial Act of 1974, 18 U.S.C. 3162(a)(2) (authorizing dismissal of an indictment when a defendant is not brought to trial within specified time limits). Yet, a prosecutor who deliberately engages in misconduct presumably has concluded that such misconduct will benefit his case. The threat of dismissal when the defendant *has* been prejudiced would itself provide a deterrent in that situation. More fundamentally, we believe that the threat of contempt, disciplinary action, or judicial disapproval in a published decision provides a greater deterrent against prosecutorial misconduct without imposing the substantial costs on the public described above.

error, will refuse to indict. Thus, a requirement of prejudice does not, as the Bank of Nova Scotia alleges (Br. 36), render the rules governing grand jury proceedings "dead letters," any more than the harmless error rule makes "dead letters" of the rules of evidence and procedure that are designed to ensure a fair trial.

Finally, petitioners have not offered a workable test for determining *when* a court should dismiss an indictment in the absence of prejudice. For example, would one deliberate error count for more than a large number of negligent errors? Would dismissal *ever* be appropriate in the absence of bad motive? Cf. Kilpatrick Br. 11 (noting that even unintentional misconduct threatens the grand jury's integrity). Should a court be less willing to dismiss an indictment stemming from a lengthy investigation? Would dismissal ever be appropriate when an error is not a recurrent one in a particular jurisdiction? Should constitutional errors weigh more heavily than violations of rules of procedure? Would the extent of the prosecutor's prior experience in conducting grand jury investigations be relevant? In addition, questions would no doubt arise as to whether dismissal in the absence of prejudice would be appropriate *during* trial but before the jury has rendered its verdict. These difficult questions underscore the prospect of endless litigation – and widely varying standards among jurisdictions – if this Court were to sanction dismissals of indictments in the absence of prejudice.

II. DISMISSAL OF THE INDICTMENT WOULD BE INAPPROPRIATE IN THIS CASE EVEN IF AN INDICTMENT MAY BE DISMISSED WITHOUT A SHOWING OF PREJUDICE

A. Even if dismissal of an indictment in the absence of prejudice were appropriate in some class of cases, dismissal would be inappropriate in this case.

The Second Circuit, which is the only circuit that has ever dismissed an indictment in the absence of prejudice,

has stated that dismissal is appropriate only when "the course of official misconduct is a demonstrated, long-standing one," *i.e.*, when "the pattern of misconduct is widespread or continuous." *United States* v. *Fields*, 592 F.2d 638, 648 (2d Cir. 1978), cert. denied, 442 U.S. 917 (1979); accord, *e.g.*, *United States* v. *Brown*, 602 F.2d 1073, 1076-1077 (2d Cir.), cert. denied, 444 U.S. 952 (1979).

In the present case, there is no claim that the conduct at issue has been widespead in the District of Colorado (or in any other district). The district judges never suggested that any of the conduct that the court of appeals found to be improper had arisen regularly in other cases or involved persons other than the prosecutors who conducted the investigation in this case. To the contrary, Judge Winner went out of his way to point out that "I have had my fair share of experience in dealing with Tax Division lawyers for whose ability and ethics I have the highest regard" (Pet. App. D10). He expressed similar high regard for the United States Attorney's Office in Denver (see *id.* at D1, D2). And petitioners have likewise made clear that they are not alleging any widespread abuse extending beyond this case. As Judge Winner noted (*id.* at D2), "[d]efense counsel carefully point out that neither they nor their clients complain about anything other than acts of the IRS and Department of Justice Tax Division lawyers who ran the grand jury and tried the [obstruction of justice] case." Thus, even under the standard applied in the Second Circuit, dismissal would not be appropriate here.

A second possible standard for dismissing indictments in the absence of prejudice is the one proposed by amici (NACDL Br. 26; ACLU Br. 15): to dismiss if the error was more than an inadvertent or isolated occurrence. Even under that standard, which has not been applied by any court of appeals,[13] dismissal would not be required here.

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[13] The test advocated by amici was proposed by the Third Circuit in *United States* v. *Serubo*, 604 F.2d 807, 817 (1979). The Third Circuit,

The record in this case reveals that the alleged errors were isolated instances in a 20-month investigation that involved dozens of witnesses and thousands of documents. It would be unreasonable to expect that no errors would be uncovered following such a lengthy investigation, particularly when thousands of pages of grand jury materials were made available to the defense for line-by-line scrutiny.[14] See generally *Van Arsdall*, 475 U.S. at 681 (noting the "virtually inevitable presence of immaterial error" in a criminal trial and stating that a defendant is entitled "to a fair trial, not a perfect one"). The record in the present case reveals that, on the whole, the investigation was conducted fairly and professionally. The transcripts of the prosecutors' statements to the grand jury throughout the 20-month investigation demonstrate that the prosecutors undertook to ensure that any indictment returned would be the result of a fair and independent grand jury investigation (see generally Pet. App. A27-A28 n.20 (citing examples)). For instance, the prosecutors repeatedly admonished the grand jury that an indictment should not be returned unless the grand jurors were convinced that the targets of the investigation had willfully violated the law (J.A. 95-97, 165, 167-169, 176, 181). On several occasions, the prosecutors stated that they were advocates and that the grand jurors should evaluate their remarks in that light (J.A. 116, 177, 191-192). In addition, the prosecutors explained that the grand jurors were the

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however, has never applied that test, as it has never dismissed an indictment in the absence of a showing of prejudice. See *United States* v. *Martino*, 825 F.2d 754, 759-760 (1987).

[14] The Bank of Nova Scotia errs in asserting (Br. 4, 6-7 & n.6) that the prosecutors deliberately tried to conceal misconduct by suppressing certain grand jury transcripts. While some proceedings were apparently overlooked and not transcribed, there is nothing in the record to indicate that the failure was intentional, and the district court made no such finding (see Pet. App. C2-C3).

sole judges of credibility (J.A. 171). Those remarks of the prosecutors—made throughout the investigation—belie the view that the prosecutors were deliberately attempting to usurp the grand jury's independence.

By the same token, the transcripts rebut the district court's assertion (Pet. App. C54) that the grand jury "was converted into little more than a rubber stamp." As the court of appeals noted, "[t]he grand jury transcripts portray an active and questioning grand jury," one that was "familiar with the record," asked "thoughtful[]" questions, and "vigorously questioned the prosecutors" (Pet. App. A27-A28 & n.20 (citing numerous examples)).

In short, while we concede that the prosecutors committed certain nonprejudicial errors, we submit that petitioners are wrong in describing the record in this case as reflecting "[u]nprecedented, deliberate and pervasive governmental misconduct" (Kilpatrick Br. 3). Since the overall conduct of the prosecutors during the investigation was proper, the extreme sanction of dismissal of the indictment would be inappropriate.

B. An analysis of the specific allegations of misconduct made by petitioners further shows that petitioners have greatly exaggerated the seriousness of the alleged misconduct and that dismissal would be inappropriate here. Petitioners cite nine purported violations committed by the prosecutors in this case (see Bank Br. 8-25).[15] In several instances, the "errors" involve conduct that is entirely lawful. In others, there is no evidence to support the district court's findings. And in the remainder of the categories, the errors constitute at most exercises of poor judgment on the part of the prosecutors, rather than deliberate efforts to undermine the integrity of the grand jury.

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[15] For convenience, we will follow the Bank of Nova Scotia's categories in discussing the various alleged errors.

1. *Use of the term "agents of the grand jury"*

During the grand jury investigation, one of the prosecutors administered an oath to certain IRS agents who appeared before the grand jury and referred to them as "agents of the grand jury" (see, *e.g.*, J.A. 91). The court of appeals did not decide whether the use of that term was error; rather, it held that petitioners had not suffered any prejudice from its use (Pet. App. A26). In our view, the designation of the agents as "agents of the grand jury" was not error at all. In any event, it is surely not the kind of egregious misconduct that would warrant dismissal of an indictment.

The term "agents of the grand jury" was not created by the prosecutors; that term has been used by this Court and numerous other courts.[16] In *United States* v. *Jones*, 766 F.2d 994, 1001, cert. denied, 474 U.S. 1006 (1985), the Sixth Circuit specifically rejected the view of the district court in this case and held that the swearing of a government agent as an "agent of the grand jury" was not prosecutorial misconduct and did not warrant dismissal of an indictment. The court stated that it was "not persuaded * * * that use of the word 'agent' in connection with government personnel assisting a grand jury will undermine the foundation of public trust and confidence in the system" (*ibid.*). See also *United States* v. *Stanford*, 589 F.2d 285, 292 (7th Cir. 1978) (expressing approval of the grand jury's taking "precautions to preserve secrecy * * * by swearing the FBI personnel as agents and cautioning them about the need for secrecy"), cert. denied, 440 U.S.

[16] See, *e.g.*, *United States* v. *Mara*, 410 U.S. 19, 20 (1973); *id.* at 24 (Douglas, J., dissenting); *In re Grand Jury Proceedings (Mills)*, 686 F.2d 135, 136 (3d Cir.), cert. denied, 459 U.S. 1020 (1982); *In re Perlin*, 589 F.2d 260, 262 (7th Cir. 1978); see also *United States* v. *Cosby*, 601 F.2d 754, 757-758 n.6 (5th Cir. 1979); *In re Atterbury*, 323 F.2d 726 (6th Cir. 1963); but cf. *United States* v. *Claiborne*, 765 F.2d 784, 794-796 (9th Cir. 1985), cert. denied, 475 U.S. 1120 (1986).

983 (1979).[17] The term "agent of the grand jury" was a reasonable shorthand way to refer to the agents' proper role in the investigation, in which they served as "government personnel * * * deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law." Rule 6(e)(3)(A)(ii); see also Pet. App. A25-A26; *United States* v. *Sells Engineering, Inc.*, 463 U.S. 418, 430 & n.13 (1983).

The prosecutors did not attempt to mislead the grand jury by referring to the IRS agents as "agents of the grand jury." In particular, they did not urge the grand jurors to treat the agents as somehow more reliable because they were serving as the grand jurors' agents. Indeed, it is significant that, on numerous occasions, the prosecutor referred to the agents as "my agent(s)" (see, *e.g.*, J.A. 96, 98, 99, 108, 110, 113, 114, 115, 117, 137, 153, 163, 165, 171, 176). Similarly, contrary to the Bank of Nova Scotia's contention (Br. 12), the record reveals that the grand jury understood that the agents were aligned with the prosecutors and that their testimony could not be accepted without assessment of their governmental bias. For instance, during discussions with the prosecutors, grand jurors referred to the agents as "your guys" or "your agents" (see J.A. 117, 157).[18] For these reasons, the use of

[17] Moreover, the prosecutor who administered the oath to the agents testified at the hearing that in Atlanta, Georgia, where he had had prior experience, government agents had been sworn and referred to as agents of the grand jury (J.A. 45-46). He also testified that he was aware that the practice was followed in the Southern District of Florida (J.A. 46). The prosecutor admitted that he was not authorized to administer an oath (J.A. 57; Pet. App. C4). The real issue, however, is not that technical error but the propriety of the designation "agents of the grand jury" and the role played by the agents.

[18] Similarly, there is no evidence that the agents attempted to make use of their designation in performing their duties. The agents testified at the hearing that, to their recollection, they never used the term

the term "agent of the grand jury," even if it was technically inaccurate, was not the type of conduct that warrants dismissal in the absence of prejudice.

2. *Presentation of summaries of evidence*

The district court found that the government presented inaccurate and misleading summaries of evidence to the grand jury (Pet. App. C25-C31). The court of appeals approved the use of summaries in general, especially in complex cases (*id.* at A21). The court, however, found it unnecessary to decide whether the summaries were accurate, since the court concluded that any error on that score resulted in no prejudice to the defendants (*id.* at A28-A29). At bottom, the challenge to the accuracy of the summaries is indistinguishable from the argument that unreliable or incompetent evidence was presented to the grand jury, a claim that this Court has held not to be a valid basis for dismissing an indictment. See *Calandra*, 414 U.S. at 344-345 (validity of an indictment "is not affected by the character of the evidence considered"); *Costello*, 350 U.S. at 364 (defendants may not challenge indictments "on the ground that they are not supported by adequate or competent evidence").

Although the court of appeals did not expressly reject the district court's findings as to the accuracy of the summaries, the court rejected the argument that the Bank of Nova Scotia makes in this Court—that the government's handling of the summaries deprived the grand jury of its ability to make an independent determination of probable cause with respect to the Bank. See Pet. App. A28-A29.

"agent of the grand jury" when interviewing witnesses (J.A. 29, 31, 35). On a related point, the district court was plainly wrong in finding (Pet. App. C8) that the agents convened grand jury sessions. The court of appeals, in rejecting that finding, stated that it was "unable to find an instance in the record [where] the IRS agents convened the grand jury sessions without Government attorneys being present" (*id.* at A23 n.14).

We submit that the record supports that finding by the court of appeals, and fails to support the district court's finding that the summaries were inaccurate and were presented in a misleading fashion.

The summaries in dispute relate primarily to testimony by IRS Agent Richard Mendrop on September 29, 1982, the day before the indictment was returned, regarding the evidence against the Bank of Nova Scotia. The district court found that the government misled the grand jury into believing that the summaries were based solely on prior testimony before the grand jury rather than on other information obtained by Mendrop during his investigation (Pet. App. C26).

In fact, Mendrop never testified that he was just summarizing prior testimony, and the prosecutor never said that he was. The district court's conclusion was based in large part on the following statement by a prosecutor shortly before Mendrop appeared (J.A. 176): "I will put my agents up here to summarize, just walk through, one more time, and refresh your memory." See also J.A. 161. But the prosecutor, in making that remark, did not state that Mendrop would be summarizing only testimony previously heard by the grand jury. And Mendrop himself made it clear that he was discussing not only evidence previously presented to the grand jury but also evidence he had obtained in assisting the prosecutor in conducting the grand jury investigation. Thus, at the beginning of the testimony at issue, Mendrop informed the grand jury that he had "analyzed the evidence which [he had] gathered" and that he would "summarize the evidence" for the grand jury (J.A. 181). Later, in discussing information that he had obtained, Mendrop referred to a "statement" (as opposed to "testimony") from a particular person (J.A. 190). Moreover, the grand jury was well aware that some of the information it received during the investigation was based on interviews conducted outside the grand jury's presence (see, *e.g.*, J.A. 113-115, 136-137, 155-156, 158-159; see

also J.A. 163-164). And a grand jury can reasonably be expected to know which witnesses have testified before it and to recall the testimony of such witnesses.

The district court found that Mendrop's summary was "an inaccurate recitation of 'facts' in several significant respects" (Pet. App. C28). Specifically, Mendrop testified that Tom Waters—a former owner of another bank (to which petitioner Kilpatrick owed money)—had stated that he had been introduced to Monte Smith, the manager of the Bank of Nova Scotia's Cayman Islands branch, at Kilpatrick's offices in Denver (J.A. 189-190). The district court found (Pet. App. C28) that this testimony was incorrect because Waters' description of Smith at petitioner Kilpatrick's trial on the obstruction of justice count of the indictment did not seem to fit Smith.

In the first place, the question whether Smith visited Kilpatrick in Denver was not essential to the government's proof of the Bank's criminal conduct. Other evidence pertaining to the Bank was presented both during Mendrop's summary[19] and during other parts of the investigation.[20]

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[19] For instance, Mendrop noted that the Bank permitted Kilpatrick to close a certain account and remove the funds even though Kilpatrick did not have signature authority (G.J. Tr., Mendrop, 9/29/82, 9:32 a.m., at 68-69); that the Bank had knowledge of Kilpatrick's various business entities involved in the tax shelters (*id.* at 70-71); that, in transactions involving purported financing of the tax shelter scheme, the Bank stopped payment on a check and backdated another check (involving about $18 million) under suspicious circumstances (*id.* at 65-66; see Indictment 17); and that the Bank received a legal bill for work performed in examining a tax shelter that the Kilpatrick organization had put together (but did not sell) (J.A. 188).

[20] For instance, testimony of various witnesses demonstrated that the Bank was knowingly involved in a check kiting scheme that was part of the fraud under investigation (J.A. 101-108, 117-119). In addition, exhibits before the grand jury included records of the Bank relating to fraudulent tax shelter transactions (see, *e.g.*, J.A. 172-173). The exhibits showed that the Bank had received a prospectus regarding an investment entity put together by the Kilpatrick organization, and that the Bank therefore had reason to know that Kilpatrick was in the tax shelter business (see Gov't C.A. Br. 29). There was also testimony (J.A. 174-175) relating to the Bank's suspicious backdating and substitution of a check.

In any event, there was no showing that the prosecutors offered evidence that they knew to be false, even on the narrow question of whether Smith had visited Kilpatrick in Denver.[21] In short, petitioners have failed to show that there was any misconduct concerning the summaries, let alone any conduct that was so egregious as to warrant dismissal of the indictment.[22]

3. *Mistreatment of an expert witness*

Both the district court (Pet. App. C33-C34) and the court of appeals (*id.* at A27) criticized the treatment of Roland Hjorth, a tax professor at the University of

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[21] As recounted by Mendrop, Smith's visit was described not only by Waters, but also by Kilpatrick's chauffeur (see J.A. 189). The district court noted that the government had doubts about the accuracy of Waters' statement regarding Smith (Pet. App. C28). In the testimony cited by the district court, however, the prosecutor was referring to doubts that arose several months prior to the indictment; he testified that steps were subsequently taken to resolve those doubts (J.A. 88). In any event, doubts by the government would not necessarily mean that Waters' statement was wrong. And there is no requirement that a prosecutor inform a grand jury any time he is not absolutely certain that a particular piece of evidence is reliable.

[22] Similarly, the district court erred in determining (Pet. App. C30-C31) that a prosecutor mischaracterized the evidence against the Bank when he stated, shortly before Mendrop's summary (J.A. 178-179): " '[A]s my agents will tell you there is evidence that the bank knew it was the IRS—they were in fact told that it was the IRS they were defrauding.' " The evidence (see, *e.g.*, notes 19 and 20, *supra*) provided a reasonable inference that the Bank knew that the IRS was being defrauded, even if it was not "told" that explicitly. Cf. *United States* v. *Nealy*, 729 F.2d 961, 962-963 (4th Cir. 1984). In any event, the prosecutors repeatedly stated during the investigation that they were advocates and that the grand jury should scrutinize their statements as such (see J.A. 116, 177, 191-192).

Washington Law School, by one of the prosecutors.[23] As the court of appeals concluded, that incident did not prejudice petitioners (*id.* at A27). We submit that the prosecutor's actions, while regrettable, do not warrant dismissal of the indictment.

The incident, which occurred during a lunch break while the grand jury was not in session (W. Tr. 491-493), was at worst a debate between two lawyers arising out of a disagreement as to legal theories, in which the prosecutor may have expressed himself too strongly in the heat of the moment (see W. Tr. 496-507 (testimony of Hjorth)). Indeed, in appearing before the grand jury after the incident, Hjorth stated that he appreciated the prosecutor's "prodding" him into thinking things through (G.J. Tr., Hjorth, 7/20/82, 4:05 p.m., at 6). And Hjorth testified at the motions hearing that his grand jury testimony was not affected by the prosecutor's conduct (W. Tr. 481-482). In fact, when the incident occurred, Hjorth had already said all that he intended to say to the grand jury, and he was

[23] Hjorth testified as an expert witness at the request of a target (see Pet. App. D15). The prosecutors called Hjorth to discuss tax law even though they were under no legal duty to do so. Although the law is not entirely settled, several circuits have held that a prosecutor has no duty to present exculpatory evidence to the grand jury. See, *e.g.*, *United States* v. *Mitchell*, 777 F.2d 248, 263 (5th Cir. 1985), cert. denied, 476 U.S. 1184 (1986); *United States* v. *Hawkins*, 765 F.2d 1482, 1488 (11th Cir. 1985), cert. denied, 474 U.S. 1103 (1986); *United States* v. *Sears, Roebuck & Co.*, 719 F.2d 1386, 1394 (9th Cir. 1983), cert. denied, 465 U.S. 1079 (1984). Subsequent to the indictment, the Tenth Circuit held, contrary to several circuits, that a prosecutor is required to present "substantial" exculpatory evidence to the grand jury. See *United States* v. *Page*, 808 F.2d 723, 727-728 (1987) (collecting conflicting authorities), cert. denied, No. 86-6848 (June 8, 1987). It is doubtful that the prosecutors would have been required to present Hjorth's legal theory to the grand jurors, much less call Hjorth as a witness, even under the standard later adopted by the Tenth Circuit. Cf. *United States* v. *Sells Engineering, Inc.*, 463 U.S. 418, 430 (1983) (noting that the prosecutor "advises the [grand] jury on the applicable law").

asked only a few questions when he appeared again before the grand jury later in the day (see W. Tr. 472-473, 491).[24] Finally, although two grand jurors may have heard the conversation (see J.A. 61; W. Tr. 377, 493), the prosecutors later instructed the grand jury (on the day the indictment was returned) to disregard anything they may have heard in conversations between a prosecutor and a witness (J.A. 191).[25]

[24] Contrary to Judge Winner's suggestion, which Judge Kane apparently adopted (see Pet. App. C34), Hjorth did not testify that the prosecutor " 'impl[ied] that the Tax Division of the Department of Justice will take after the witness and will complain to the University of Washington.' " Hjorth testified that during the conversation at issue, the prosecutor stated, "I'll see you in court" (W. Tr. 502). The prosecutor acknowledged that he had made such a statement, but he testified that he did not mean it as a threat to prosecute the witness (J.A. 50). The prosecutor described the statement as "a rather flippant expression meaning * * * I don't think you can support that position anyway, anywhere" (J.A. 63). Hjorth conceded at one point during the hearing that he was not intimidated by the statement and that, in the context of two lawyers debating a legal point, the statement could be characterized as, "I sure as heck don't agree with that and I'll have a judge test this one if you want to keep that concept alive" (W. Tr. 503-504). Hjorth also testified that the prosecutor had called him a discredit to his profession as a law professor for testifying on behalf of one of the targets (W.Tr. 377-378, 496-497). The prosecutor denied making such a statement (J.A. 60), and Hjorth was unable to recall when in the sequence of events the statement was allegedly made (W. Tr. 504-507).

[25] As this Court has indicated with respect to petit jurors, there is an "almost invariable assumption of the law that jurors follow their instructions." *Richardson* v. *Marsh*, No. 85-1433 (Apr. 21, 1987), slip op. 6; accord, *e.g.*, *Greer* v. *Miller*, No. 85-2064 (June 26, 1987), slip op. 9 n.8; see also *United States* v. *Drake*, 494 F.2d 648, 650 (7th Cir. 1974) (possibility that petit jurors may have overheard a witness tell the prosecutor that the defendant's alibi witness was "lying" not reversible error, since there was no direct evidence that any jurors actually heard the remark and the trial court gave a general curative instruction).

4. *Granting informal immunity*

In dismissing the indictment, the district court stated that the prosecutors "ignored entirely the federal immunity statute (18 U.S.C. §§ 6001, *et seq.*) * * * and, instead, secured testimony by engaging extensively in * * * bestowing 'informal immunity' through 'letters of assurance' " (Pet. App. C20). According to the district court, that practice was "not merely damnable * * * [but] clearly illegal" (*id.* at C20 n.13). In reaching that decision, the district judge relied heavily on one of his own decisions, which was later reversed by the Tenth Circuit, *United States* v. *Anderson,* 577 F. Supp. 223, 233 (D. Wyo. 1983) (Kane, J.), rev'd, 778 F.2d 602, 606 (10th Cir. 1985).

The court of appeals rejected the district court's holding that the use of informal immunity was illegal (Pet. App. A22 (citing authority)).[26] The court of appeals' ruling accords with the ruling of every other circuit that has squarely faced the issue. See *United States* v. *Winter,* 663 F.2d 1120, 1133 (1st Cir. 1981) (citing cases), cert. denied, 460 U.S. 1011 (1983); *United States* v. *Librach,* 536 F.2d 1228, 1230 (8th Cir.), cert. denied, 429 U.S. 939 (1976); cf. *United States* v. *Murphy,* 768 F.2d 1518, 1532 (7th Cir. 1985), cert. denied, 475 U.S. 1012 (1986); *United States* v. *Gullett,* 713 F.2d 1203, 1208 (6th Cir. 1983), cert. denied, 464 U.S. 1069 (1984).[27]

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[26] As the court of appeals' treatment of this issue illustrates (see also pages 39-41, 43-46, *infra*), the Bank of Nova Scotia is profoundly wrong in repeatedly asserting that the Tenth Circuit did "not disput[e] the impropriety of the [prosecutors'] conduct" (Br. 27) and that "[t]he misconduct findings of Judge Kane were not disturbed by the majority of the panel of the Court of Appeals" (*id.* at 7); see also *id.* at 4, 26, 32; but see Kilpatrick Br. 40).

[27] The Bank of Nova Scotia attempts to argue that the manner in which informal immunity was used prejudiced petitioners (Br. 17-18), but its argument is in essence just a quarrel with the practice of providing promises of immunity to prospective witnesses in exchange for their cooperation and truthful testimony. The court of appeals found (Pet. App. A22) that the defendants suffered no prejudice based on the use of informal immunity.

5. *Calling witnesses who asserted their privilege against compulsory self-incrimination*

The district court held (Pet. App. C23-C25) that the prosecutors engaged in misconduct by bringing before the grand jury seven witnessess who the prosecutors believed were likely to invoke the Fifth Amendment. That holding was erroneous, and it was properly rejected by the Tenth Circuit (*id.* at A26-A27).

The courts have held that even a target of an investigation may be compelled to appear before a grand jury and, in effect, be tested in front of the grand jurors. See, *e.g.*, *United States* v. *Friedman,* 445 F.2d 1076, 1088 (9th Cir.), cert. denied, 404 U.S. 958 (1971); *United States* v. *Cefalu,* 338 F.2d 582, 584 (7th Cir. 1964). It follows, *a fortiori,* that there is no bar to calling a third party, whose assertion of the privilege would have little likelihood of prejudicing the target.

The rule is no different even when the prosecutor is informed (or otherwise has reason to believe) that a witness intends to invoke the Fifth Amendment. Numerous courts have held that calling a witness before the grand jury under such circumstances is not improper. See, *e.g.*, *United States* v. *Wolfson,* 405 F.2d 779, 784-785 (2d Cir. 1968) (collecting cases), cert. denied, 394 U.S. 946 (1969); *United States* v. *DeSapio,* 299 F. Supp. 436, 440 (S.D.N.Y. 1969); *United States* v. *Zirpolo,* 288 F. Supp. 993, 1007 (D.N.J. 1968); *United States* v. *Leighton,* 265 F. Supp. 27, 36-38 (S.D.N.Y. 1967).

The logic of these cases is apparent. Even if the prosecutors expected that the witnesses would assert the Fifth Amendment, they could not be certain of that until the witnesses actually appeared under oath before the grand jury. Witnesses not infrequently change their strategies when they must actually appear before a grand jury. Moreover, by calling the witnesses, the government was able to make a complete record on the thoroughness of its investigation (see J.A. 65), an issue that sometimes arises

at trial in tax prosecutions. See generally *Holland* v. *United States,* 348 U.S. 121, 135-136 (1954).

If petitioners were correct that prosecutors may not call before the grand jury witnesses who announce an intention to assert their Fifth Amendment privilege, a witness "could automatically gain immunity from Grand Jury subpoena" merely by advising the prosecutor that he intends to invoke the Fifth Amendment; in such a case the witness " 'would denude that ancient body of a substantial right of inquiry' " (*Leighton,* 265 F. Supp. at 38 (citation omitted)).[28]

Finally, as the court of appeals pointed out (Pet. App. A26, A27), the record reveals that the prosecutors ceased their questioning once each witness invoked the Fifth Amendment (see J.A. 139-140, 141-142, 143, 150-151, 153-154, 154-155, 158). And the prosecutors in no way tried to build their case around these assertions of the Fifth Amendment. To the contrary, they took care to prevent prejudice to the defendants by repeatedly advising the

[28] Contrary to the district court's conclusion (Pet. App. C46-C47), there is nothing improper in the fact that four of the witnesses were asked questions concerning payment of their attorneys' fees (see J.A. 139-140, 141-142, 143, 149-150). The grand jury was entitled to know whether one of the targets was paying the attorneys' fees for witnesses who were refusing to testify before the grand jury. Payment of such fees, for example, could constitute an act in furtherance of a conspiracy. See generally *In re Grand Jury Proceedings* (*Pavlick*), 680 F.2d 1026, 1028 (5th Cir. 1982). In addition, "any conduct, the likely effect of which would be to mislead or conceal," is evidence of willfulness in a criminal tax prosecution. *Spies* v. *United States,* 317 U.S. 492, 499 (1943). An attempt by a target to induce witnesses to withhold information from the grand jury would constitute such conduct and would therefore be evidence of intent and guilty knowledge. See generally *Ewing* v. *United States,* 386 F.2d 10, 15 (9th Cir. 1967) (attempt to bribe a witness), cert. denied, 390 U.S. 991 (1968). Furthermore, a corrupt endeavor to cause a witness to assert the Fifth Amendment constitutes obstruction of justice. See, *e.g.*, *United States* v. *Arnold,* 773 F.2d 823, 824 (7th Cir. 1985); *United States* v. *Baker,* 611 F.2d 964 (4th Cir. 1979).

grand jurors that they should not draw any adverse inferences from a witness's invocation of the Fifth Amendment (see, *e.g.*, J.A. 109, 130-131, 131-132, 155, 169-170). That advice was given not only months prior to the time the witnesses asserted the privilege, as acknowledged by the district court (Pet. App. C25), but also virtually contemporaneously with the testimony of two of the witnesses (see J.A. 153-155; see also J.A. 169-170). In short, there is nothing about the brief appearances of the seven witnesses who invoked the Fifth Amendment that would warrant dismissing the indictment. See generally *Namet* v. *United States,* 373 U.S. 179, 186-189 (1963); *Baker* v. *United States,* 389 F.2d 629, 630-633 (7th Cir.), cert. denied, 393 U.S. 875 (1968).

6. *Violations of Rule 6(d)*

We do not dispute that Fed. R. Crim. P. 6(d) was violated by the simultaneous appearances before the grand jury of two IRS agents to read testimony given before the prior grand jury. The violations, however, were only technical ones. The prosecutors did not have any improper motive, and, as the court of appeals found (Pet. App. A18), the joint appearances could not possibly have prejudiced the grand jury.

The joint reading of transcripts began when the agents complained of colds and sore throats and asked the prosecutors whether they could read together to break up the procedure (J.A. 52-53). Previously, only one agent had appeared at a time to read transcripts (see, *e.g.*, J.A. 119). The prosecutors agreed to permit two agents to read transcripts at the same time (one reading the questions and the other reading the answers) (J.A. 54). Thus, the procedure was initiated for an entirely innocent reason, even though it was technically inconsistent with Rule 6(d).

The two special agents who did most of the joint readings—Mendrop and Raybin—were familiar figures who had appeared before the grand jury individually prior to their joint appearances (*e.g.*, G.J. Tr., Mendrop,

8/4/81, 9:25 a.m.; G.J. Tr., Raybin, 9/9/81, 10:02 a.m.). It is not disputed that the agents gave no testimony of their own when they appeared together before the grand jury. And according to the agents' testimony in the hearing before Judge Kane (J.A. 66-67)—which was not contradicted by the transcripts of the grand jury proceedings (see J.A. 53-54)—no questions were asked during the readings. Indeed, the prosecutors took steps to make sure that questioning would not occur. Thus, as the district court noted (Pet. App. C8), the grand jurors were advised not to ask questions when the agents appeared to read transcipts. Instead, they were instructed to jot down any questions they had, so that the prosecutors could answer them later (J.A. 137-138). And the prosecutors instructed the agents not to answer any questions (J.A. 53). The prosecutors also advised the grand jurors that if they were not satisfied with having particular evidence introduced through the transcript, the witness could be called in person (J.A. 138).

The joint reading of transcripts was a purely ministerial function that did not place the agents' credibility at issue. Cf. *United States* v. *Blitz*, 533 F.2d 1329, 1344 (2d Cir.), cert. denied, 429 U.S. 819 (1976). Thus, the technical violation of Rule 6(d) in this case did not implicate the concerns to which the rule is addressed—*i.e.*, to safeguard the secrecy of the grand jury proceedings and to protect the grand jurors from the possibility of undue influence. See *Mechanik*, 475 U.S. at 74 (O'Connor, J., concurring in judgment). Here, grand jury secrecy was not jeopardized; the agents were persons to whom disclosures of grand jury information could properly be made under Rule 6(e)(3)(A)(ii). And there was no danger of undue influence or intimidation of the grand jurors. Unlike in the case of in tandem testimony, where there is a potential for undue influence because each witness may corroborate the other's account and add to the other's credibility, a risk of undue influence is not present when the joint appearance of witnesses involves only the reading of transcripts. And

there is nothing inherently intimidating about two agents reading transcripts to the grand jury.[29] In short, the technical violation of Rule 6(d) in this case does not even remotely warrant dismissal of the indictment.

7. *Alleged use of grand jury to gather information for civil purposes*

The district court found that the record "suggests that information was disclosed to other IRS agents for use in civil cases" (Pet. App. C9). The district court also found that there was a "serious possibility" that the grand jury was "manipulated in order to obtain evidence useful in later civil litigation" (*id.* at C12). The court of appeals rejected those findings, noting the lack of record support for them (*id.* at A23) and pointing out (*id.* at A25 (footnote omitted)) that the grand jury's return of "an extensive indictment is probative evidence that it was not abused to obtain evidence for civil purposes."[30]

The court of appeals correctly rejected the district court's findings. The district court's determination that information may have been disclosed for civil purposes is not only without evidentiary support but is in conflict with prior findings made by the district court itself. Near the end of the hearing, Judge Kane stated (J.A. 89-90), "[A]s I recall the testimony of the I.R.S. special agents, they have emphatically denied turning over grand jury material to

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[29] Indeed, multiple government personnel routinely appear before grand juries. For example, Rule 6(d) provides that government "[a]ttorneys" (emphasis added) may be present in the grand jury, along with "the witness under examination" (who may himself be a government agent). Thus, the presence of more than one government official in the grand jury is not deemed by Rule 6(d) to be coercive per se.

[30] The Bank of Nova Scotia misstates the court of appeals' holding in noting that the court "held that the return of an indictment demonstrates that the grand jury was not abused for *solely* civil purposes" (Bank Br. 21 n.19 (emphasis in original)). The italicized language is *not* part of the court's holding.

the civil branch and I haven't seen any evidence yet that says that that indeed was done." No such evidence was offered at any time after Judge Kane made that observation.

Similarly, the district court's finding of manipulation is based entirely on speculation. In making that finding, the district court cited the fact that the IRS had an interest in the evidence developed (Pet. App. C12-C13), that several investors in the tax shelters were interviewed by government agents but were not called before the grand jury (*id.* at C13), and that the IRS civil personnel performed calculations of the taxes due on some of the investors' tax returns and that those calculations were not presented to the grand jury (*id.* at C13-C14). Those factors do not support the district court's finding of possible manipulation.

Most criminal tax cases involve alleged violations of provisions of the tax laws that, in the absence of willfulness, would still constitute civil violations. Thus, the mere fact that the government performed calculations of tax liability and gathered information that may also have been relevant in a civil action is not enough to permit an inference that the grand jury was manipulated. That is especially true in the present case. As one of the special agents testified (J.A. 29-30), the computations of tax liability had no civil purpose, and those computations were not turned over to anyone at the IRS who had a civil function. And as the court of appeals noted (Pet. App. A24), nothing in Fed. R. Crim. P. 6 prohibited the prosecution from availing itself of the expertise of IRS civil personnel, who performed the computations. See Fed. R. Crim. P. 6(e)(3)(A)(ii); *United States* v. *Sells Engineering, Inc.*, 463 U.S. 418, 428 (1983).[31]

[31] According to the district court (Pet. App. C38), the government acted "in direct contravention" of this Court's decisions in *United States* v. *Sells Engineering, supra* (holding that Justice Department Civil Division attorneys may not obtain grand jury materials for use in civil actions without a court order), and *United States* v. *Baggot*, 463 U.S. 476 (1983) (holding that an IRS civil tax audit is not

Furthermore, the investor interviews were entirely proper as part of a thorough investigation. It is apparent that in a criminal investigation involving a tax shelter, investors can be a source of information on the harm caused to the government by the shelter. Moreover, the interviews were relevant to possible mail fraud charges. At a trial for mail fraud, the testimony of investors as to their reasons for investing in the tax shelters would be relevant to establish the representations that were made to investors and to show that those representations had the potential to defraud the investors. Indeed, during the hearings before the district court, an agent explained the purpose of the investor interviews and indicated their relationship to mail fraud (J.A. 26). In addition, the grand jury transcripts reveal that at least three investors appeared before the grand jury (see G.J. Tr., Long, 12/9/81, 10:04 a.m., at 5-6; G.J. Tr., Henkel, 2/4/82, 12:52 p.m., at 6-7, 9; G.J. Tr., Moffet, 3/2/82, 3:05 p.m., at 4-8).[32] Finally, the 27-count indictment itself confirms that the interviews were conducted for a valid criminal purpose. The indictment names investors whom the defendants assisted in filing false returns and to whom the defendants mailed items (Indictment 48, 55). In short, the court of appeals properly

"preliminarily to or in connection with a judicial proceeding" for purposes of Rule 6(e)(3)(C)(i). The district court's conclusion is factually incorrect, as we have shown. Moreover, it should be noted that *Sells Engineering* and *Baggot* were not decided until *after* the indictment in the present case was returned. And the law was anything but clear prior to those decisions, as Chief Justice Burger's dissenting opinions in those cases demonstrate.

[32] There is, of course, no requirement that every person interviewed by government attorneys or agents be presented to the grand jury. Cf. *United States* v. *Chanen*, 549 F.2d 1306, 1312 (9th Cir.) (noting that "the grand jury generally relies on the prosecutor to determine what witnesses to call" and that the prosecutor "determines what evidence to present before the grand jury"), cert. denied, 434 U.S. 825 (1977). The fact that various investors were interviewed but did not testify before the grand jury does not show that the investors were interviewed for an improper purpose.

rejected the district court's finding that the grand jury had been manipulated for civil purposes.[33]

8. *Disclosure of the identity of targets of the investigation*

During the investigation, the government sent letters to potential witnesses who had had business relationships with the targets of the grand jury investigation, but who were beyond the reach of the grand jury's subpoena power. Those letters identified the targets and the general nature of the investigation. The letters indicated that "[i]t has been determined that your testimony will be helpful in resolving questions which still face the Grand Jury," and they invited the recipients to appear before the grand jury. Pet. App. C15-C16. The district court concluded (*id.* at C15-C17) that the government's disclosure of the identities of targets of the investigation violated Rule 6(e). In our view, that ruling is erroneous and provides no basis for dismissal of the indictment.

The letters in question did not constitute improper disclosures of "matters occurring before the grand jury" (Fed. R. Crim. P. 6(e)(2)); they revealed no more than would typically be revealed to a witness during questioning when he appeared to meet with a prosecutor or to testify before the grand jury. Any blanket prohibition against disclosing to potential witnesses the identity of the targets or the general subject matter of an investigation would make it impossible for the prosecutor to direct a witness's testimony to the matter under investigation or for him to determine whether the witness had any information that was of use to the grand jury. Petitioners have cited no authority—and we know of none—holding that the

[33] There is likewise no merit in the district court's finding (Pet. App. C9) that the prosecutors relinquished to the IRS their responsibility to determine the persons to whom disclosures of grand jury material would be made. As the court of appeals concluded (*id.* at A23), the district court's finding is unsupported by the record.

government, in private letters to, or discussions with, potential witnesses, may not reveal anything about the subject matter of a grand jury investigation. Thus, it was not unreasonable for the prosecutors to believe that such disclosures were a permissible way of obtaining information for the grand jury investigation.[34]

9. *Imposition of secrecy obligations on two witnesses*

In two instances, a prosecutor instructed witnesses, contrary to Fed. R. Crim. P. 6(e), that they should not reveal the fact that they had testified before the grand jury or the contents of their testimony (Pet. App. C18). Both witnesses were attorneys who had previously represented petitioners Kilpatrick and O'Donnell in administrative

[34] Also failing to support dismissal of the indictment is the district court's finding (Pet. App. C9-C12) that disclosure lists required by Rule 6(e) were inaccurate and were not filed promptly. The district court noted, without any citation to the record, that numerous IRS personnel given access to grand jury material were never identified on the lists and "remain unknown even now" (Pet. App. C9). The district court also found (*id.* at C11) that persons involved in a project to prepare a computerized index of grand jury materials were "apparently" omitted from the lists. However, the record does not show that any IRS employee was omitted from the disclosure list. Moreover, an agent had an imprecise recollection at the hearing that three people on the disclosure list were key punch operators involved in the computer project (K. Tr. 76). And we know of no evidence that any key punch operators were actually omitted. As for the promptness of the preparation of the disclosure lists, it is true that the government prepared a "catch-all" disclosure list at the end of the investigation (see Pet. App. A24). But in a 20-month investigation, it was inevitable that some personnel would not have been listed previously. There is no evidence that the prosecutors and agents deliberately delayed the addition of names to the disclosure lists for some improper purpose. On the contrary, an agent testified (J.A. 19) that the U.S. Attorney's Office, which handled the preparation of the lists, was requested to add names to the lists "at or about the time that people were to be involved." Significantly, Judge Winner stated, "I have no fault to find with the paper trail left in this matter insofar as the disclosure requirements are concerned" (Pet. App. D25).

proceedings involving the tax shelters (*id.* at C19). The prosecutor told the grand jury that they were calling the attorneys as witnesses because "[t]he primary focus of our investigation involving the financing is the factual representations made concerning Marlborough Investments Limited, IFDC." The prosecutors explained that they wanted "to know what the lawyers were told by the principals, and what information they relayed to the parties" (*ibid.*). Based on that statement, the district court concluded that the secrecy obligations were imposed for the strategic purpose of "prevent[ing] defendants from determining the nature and extent of any such communication that might have been revealed and to foreclose a challenge to such testimony based upon an applicable privilege" (*ibid.*). That conclusion is groundless.

During the hearing before Judge Kane, the prosecutor acknowledged that he had made a mistake when he attempted to impose a secrecy obligation on the witnesses, but that he had done so because of his concern over grand jury leaks (J.A. 72-75).[35] The prosecutor also testified that he had conducted only one grand jury investigation prior to the instant investigation (J.A. 87). He further testified that, at the time he examined the two attorneys, while he was familiar with Rule 6(e)(2), he was not focusing on the provision of that rule that has been interpreted as prohibiting the imposition of secrecy obligations on witnesses (J.A. 73, 77-78).

Statements of the prosecutor before the grand jury show that the prosecutor was seeking only unprivileged materials and information from the targets' attorneys, as to which the privilege had already been waived (J.A. 125-126, 128-129).[36] Neither the court nor petitioners have

[35] Earlier, there had been allegations by Kilpatrick's attorney that someone had approached Kilpatrick and attempted to sell him grand jury information (J.A. 73, 75).

[36] The fact that the prosecutor expressed interest in communications between the attorney witnesses and their clients does not by itself indicate that he was seeking privileged information, since not every communication between a lawyer and his client is privileged. See, *e.g.*, *United States* v. *Jones*, 696 F.2d 1069, 1072-1073 (4th Cir. 1982); *In re Sealed Case*, 676 F.2d 793, 808-809 (D.C. Cir. 1982); *United States* v. *Bump*, 605 F.2d 548, 550-551 (10th Cir. 1979); B. Gershman, *Prosecutorial Misconduct* § 2.4(d), at 2-22 to 2-23 (1987); cf. *United States* v. *Wolfson*, 558 F.2d 59, 66 (2d Cir. 1977) (noting that the "ordinary presumption [is] that a lawyer is competent to protect his client's confidential interests before the grand jury").

cited anything in the grand jury testimony of the two witnesses (or in any other part of the record) to indicate that the prosecutor attempted to pressure either witness into violating the attorney-client privilege.

Finally, it does not appear that the prosecutors had anything to gain by imposing the secrecy obligations. If the two attorneys had voluntarily disclosed privileged communications before the grand jury, those communications could not have been suppressed at the grand jury stage, even if petitioners had learned about the testimony immediately after it occurred. Cf. *United States* v. *Calandra, supra; Lawn* v. *United States, supra; United States* v. *Rogers*, 751 F.2d 1074, 1079 (9th Cir. 1985). More fundamentally, a secrecy obligation that takes effect *after* a witness has testified in the grand jury could not have the effect of inducing the witness to breach the attorney-client privilege (or preventing the client from stopping such a breach).[37]

* * * * *

[37] In addition to the nine grounds discussed above, petitioners cite additional alleged misconduct that warrants only brief response. First, they claim (Bank Br. 29; Kilpatrick Br. 41) that one of the prosecutors violated this Court's decision in *Massiah* v. *United States*, 377 U.S. 201 (1964), by interviewing employees of the Bank of Nova Scotia, without counsel for the Bank being present, after the issuance of the indictment. As the court of appeals (Pet. App. A22) and Judge Kane (*id.* at C49) recognized, that incident obviously could not have affected the grand jury's charging decision, since it occurred after the indictment was returned. Moreover, the prosecutor involved, who was

In sum, we submit that there is no legal or policy basis for dismissing an indictment in the absence of prejudice. But even if it were proper in some circumstances for a court to do so, that drastic step would not be appropriate here. For the most part, the present investigation was handled in a professional manner, and the record reflects that the grand jury was independent and active. Much of the alleged misconduct found by the district court was entirely lawful. The rest of the acts were isolated incidents limited to this case. Thus, even if petitioners were not required to demonstrate prejudice, the alleged errors, taken together, would not warrant the drastic remedy of dismissal of the indictment in this 20-month investigation.

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not one of the prosecutors who conducted the grand jury investigation, had only a limited role in the case prior to the return of the indictment (J.A. 36; K. Tr. 1095-1096). In any event, the conduct does not appear to have been improper. Since a corporation is a distinct entity from its stockholders, officers, and employees, the prosecutor could reasonably conclude that there was no Sixth Amendment principle that barred him from interviewing an unindicted employee of the Bank without first contacting the Bank's counsel.

In addition, the Bank of Nova Scotia refers to a statement purportedly made by a prosecutor that even if the target was not guilty, the government would "break" him with the cost of the defense (Bank Br. 3). The prosecutor strongly denied making that statement (Pet. App. C14), and both Judge Kane and Judge Winner declined to resolve the question whether the witness who attributed the statement to the prosecutor was telling the truth (see Pet. App. C14, D14-D15).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

CHARLES FRIED
Solicitor General
WILLIAM S. ROSE, JR.
Assistant Attorney General
WILLIAM C. BRYSON
Deputy Solicitor General
ROBERT H. KLONOFF
Assistant to the Solicitor General
GARY R. ALLEN
ROBERT E. LINDSAY
ALAN HECHTKOPF
Attorneys

MARCH 1988

APPENDIX

STATUTE AND RULES INVOLVED

Section 2111 of 28 U.S.C. provides:

Harmless error

On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.

Rule 6, Federal Rules of Criminal Procedure, provides in relevant part:

The Grand Jury

* * * * *

(d) Who May Be Present. Attorneys for the government, the witness under examination, interpreters when needed and, for the purpose of taking the evidence, a stenographer or operator of a recording device may be present while the grand jury is in session, but no person other than the jurors may be present while the grand jury is deliberating or voting.

(e) Recording and Disclosure of Proceedings.

(1) Recording of Proceedings. All proceedings, except when the grand jury is deliberating or voting, shall be recorded stenographically or by an elecronic recording device. An unintentional failure of any recording to reproduce all or any portion of a proceeding shall not affect the validity of the prosecution. The recording or reporter's notes or any transcript prepared therefrom shall remain in the custody or control of the attorney for the government unless otherwise ordered by the court in a particular case.

(2) General Rule of Secrecy. A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under paragraph (3)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of Rule 6 may be punished as a contempt of court.

(3) Exceptions.

(A) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than its deliberations and the vote of any grand juror, may be made to–

(i) an attorney for the government for use in the performance of such attorney's duty; and

(ii) such government personnel (including personnel of a state or subdivision of a state) as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law.

(B) Any person to whom matters are disclosed under subparagraph (A)(ii) of this paragraph shall not utilize that grand jury material for any purpose other than assisting the attorney for the government in the performance of such attorney's duty to enforce federal criminal law. An attorney for the government shall promptly provide the district court, before which was impaneled the grand jury whose material has been so disclosed, with the names of the persons to whom such disclosure has been made, and shall certify that the attorney has advised such persons of their obligation of secrecy under this rule.

(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made–

(i) when so directed by a court preliminarily to or in connection with a judicial proceeding;

(ii) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury;

(iii) when the disclosure is made by an attorney for the government to another federal grand jury; or

(iv) when permitted by a court at the request of an attorney for the government, upon a showing that such matters may disclose a violation of state criminal law, to an appropriate official of a state or subdivision of a state for the purpose of enforcing such law.

If the court orders disclosure of matters occurring before the grand jury, the disclosure shall be made in such manner, at such time, and under such conditions as the court may direct.

(D) A petition for disclosure pursuant to subdivision (e)(3)(C)(i) shall be filed in the district where the grand jury convened. Unless the hearing is ex parte, which it may be when the petitioner is the government, the petitioner shall serve written notice of the petition upon (i) the attorney for the government, (ii) the parties to the judicial proceeding if disclosure is sought in connection with such a proceeding, and (iii) such other persons as the court may direct. The court shall afford those persons a reasonable opportunity to appear and be heard.

(E) If the judicial proceeding giving rise to the petition is in a federal district court in another district, the court shall transfer the matter to that court unless it can reasonably obtain sufficient knowledge of the proceeding to determine whether disclosure is proper. The court shall order

transmitted to the court to which the matter is transferred the material sought to be disclosed, if feasible, and a written evaluation of the need for continued grand jury secrecy. The court to which the matter is transferred shall afford the aforementioned persons a reasonable opportunity to appear and be heard.

(4) Sealed Indictments. The federal magistrate to whom an indictment is returned may direct that the indictment be kept secret until the defendant is in custody or has been released pending trial. Thereupon the clerk shall seal the indictment and no person shall disclose the return of the indictment except when necessary for the issuance and execution of a warrant or summons.

(5) Closed Hearing. Subject to any right to an open hearing in contempt proceedings, the court shall order a hearing on matters affecting a grand jury proceeding to be closed to the extent necessary to prevent disclosure of matters occurring before a grand jury.

(6) Sealed Records. Records, orders and subpoenas relating to grand jury proceedings shall be kept under seal to the extent and for such time as is necessary to prevent disclosure of matters occurring before a grand jury.

* * * * *

Rule 52, Federal Rules of Criminal Procedure, provides in relevant part:

Harmless Error and Plain Error

(a) Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

* * * * *

U.S. GOVERNMENT PRINTING OFFICE: 1987—202-037/60367

Supreme Court, U.S.
FILED
APR 19 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-602

In The

Supreme Court of the United States

October Term, 1987

—o—

WILLIAM A. KILPATRICK, et al.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

—o—

REPLY BRIEF FOR PETITIONERS WILLIAM A. KILPATRICK, DECLAN J. O'DONNELL and SHEILA C. LERNER

—o—

William A. Cohan *
Jennifer A. Greene
COHAN & GREENE
1801 York Street
Denver, Colorado 80206
(303) 321-0999

Attorneys for Petitioners William A. Kilpatrick Declan J. O'Donnell and Sheila C. Lerner

* Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
POINT I	
The Government's First Major Premise Misstates the Law.	1
POINT II	
The Government's Second Major Premise Trivializes Willful, Repeated and Pervasive, Prosecutorial Misconduct by Distortion and Omission.	6
CONCLUSION	10
APPENDIX	App. 1

TABLE OF AUTHORITIES

Page:

CASE:

Ballard v. United States, 329 U.S. 187 (1946) 3

Delaware v. Van Arsdall, 475 U.S. —, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986) 7

Ex parte Bain, 121 U.S. 1 (1887) 10

In Re Sealed Case, 838 F.2d 476 (D.C. Cir. 1988) 5

Massiah v. United States, 377 U.S. 201 (1964) 9

McNabb v. United States, 318 U.S. 322 (1943) 3

Stirone v. United States, 361 U.S. 212 (1960) 10

Taylor v. Louisiana, 419 U.S. 522 (1975) 3

United States v. Hasting, 461 U.S. 499 (1983) 2

United States v. Mechanik, 475 U.S. 66 (1986) 5, 6, 10

United States v. Serubo, 604 F.2d 807 (3rd Cir. 1979), *cert. denied*, — U.S. —, 106 S.Ct. 3294, 92 L.Ed.2d 709 (1986) 2

Vasquez v. Hillery, 474 U.S. 254 (1986) 1, 3

Young v. United States ex rel. Vuitton et Fils, S.A., — U.S. —, 107 S.Ct. 2124 (1987) 2, 3, 4, 5

STATUTES AND RULES:

18 U.S.C. 241 ..... 4, 8, 9

18 U.S.C. § 1512 4

18 U.S.C. § 1512(b)(1) 8, 9

26 U.S.C. § 6103 9

26 U.S.C. § 7213 ..... 4, 9

26 U.S.C. § 7214 ..... 4, 8

TABLE OF AUTHORITIES—Continued

Page:

28 U.S.C. § 49 4

28 U.S.C. § 591 4

28 U.S.C. § 592 4

28 U.S.C. § 593 4

28 U.S.C. § 594 4

28 U.S.C. § 595 4

28 U.S.C. § 596 4

28 U.S.C. § 597 4

28 U.S.C. § 598 4

28 U.S.C. § 2111 2

Federal Rules of Criminal Procedure

6(d) 5, 6

32(a) 2

REPLY BRIEF FOR PETITIONERS WILLIAM A. KILPATRICK, DECLAN J. O'DONNELL and SHEILA C. LERNER

INTRODUCTION

To fully apprehend the significance of the lengthy list of incidents of prosecutorial misconduct established in this case and to appreciate the impact of the Court's disposition of this case on the future administration of justice, petitioners invite the Court's attention to an ancient apothegm of Roman origin: *gutta lapidem carvat non vi sed saepe cadendo*—the droplet carves the rock not by force, but by falling often. As Circuit Judge Seymour observed in her well reasoned dissent below, though it is difficult to quantify the cumulative corrosion caused by the stream of heinous government misconduct on this grand jury's decision-making process, the erosion of the integrity of the criminal justice system is readily apparent. The threat to the integrity of our criminal justice system caused and revealed by this case compels reversal of the Court of Appeals to stem the flood of misconduct and disintegrating erosion that will surely ensue if this Court fails to stop that destructive flow by damming it through dismissal of the indictment.

POINT I

THE GOVERNMENT'S FIRST MAJOR PREMISE MISSTATES THE LAW

The government's first major premise is a misstatement of the law; the contention that "[a]n indictment may not be dismissed for grand jury abuse in the absence of prejudice to the defendant" (Government's brief, hereinafter "GB", at 9) is obviously incorrect, since otherwise this Court's decisions in *Vasquez v. Hillery*, 474 U.S. 254 (1986) and its predecessors would have been erroneous.

Although it is possible to theoretically distinguish *Young v. United States ex rel. Vuitton et Fils, S.A.*, — U.S. —, 107 S.Ct. 2124 (1987) on the technical ground that the criminal convictions therein reversed were the product of a judicial accusation rather than a grand jury indictment, the distinction is pure sophistry in the context of identifying circumstances warranting the exercise of supervisory powers to dismiss criminal charges and reverse convictions in the absence of proof of prejudice.

The asserted conflict between dismissal of an indictment absent proof of prejudice and both 28 U.S.C. § 2111 and F.R.Crim.P. 52(a) is non-existent for the same reason, i.e., exercise of supervisory powers is a remedy for prosecutorial misconduct when necessary to preserve the integrity of the judicial process and deter illegal conduct, even when the violations do not establish prejudice to the defendant(s). *United States v. Hasting*, 461 U.S. 499 (1983). Only where a court exercised its supervisory powers in the absence of demonstrated prejudice and without finding: (1) a substantial threat to the integrity of the judicial process and/or (2) that the misconduct "was something other than an isolated incident unmotivated by sinister ends" would the principles of F.R.Crim. P. 52(a) and 28 U.S.C. § 2111 be violated. *United States v. Serubo*, 604 F.2d 807, 817 (3rd Cir. 1979), *cert. denied*, — U.S. —, 106 S.Ct. 3294, 92 L.Ed.2d 709 (1986).

In the discussion of its assertion that "[t]his Court's decisions compel the conclusion that an indictment may not be dismissed for procedural irregularities in the grand jury in the absence of prejudice" (GB at 15), the government does not even attempt to distinguish *Young v. United States ex rel. Vuitton et Fils, S.A.*, *supra*, and *Vasquez v. Hillery*, *supra*. Instead, the government's brief invites the reader to:

> . . . compare *Young v. United States ex rel. Vuitton et Fils S.A.*, No. 85-1329 (May 26, 1987), slip op. 21-26 (plurality opinion)(appointment of interested prosecutor raised doubt that prosecution could be conducted in disinterested manner, created appearance of impropriety to which harmless error analysis would not have been sensitive, and did not lend itself to ready assessment of its effects on the prosecution); *Vasquez v. Hillery*, 474 U.S. 254, 260-264 (1986)(racial discrimination in selection of grand jurors struck at fundamental values of judicial system and society, and was not susceptible to evaluation of resulting harm) [GB at 18].

Petitioners proffer a comparison. In *Young* considerations warranting the exercise of supervisory power were: (1) the appearance of impropriety to which harmless error analysis is not sensitive, and (2) circumstances not conducive to realistic assessment of the likelihood of prejudice. In *Vasquez* (and in *McNabb v. United States*, 318 U.S. 332 (1943); *Ballard v. United States*, 329 U.S. 187 (1946); and *Taylor v. Louisiana*, 419 U.S. 522 (1975)), the pivotal principle for invoking supervisory power involved threats to the fundamental values of the judicial system and society, which are not susceptible to evaluation of resulting harm.

The case at bar concerns scores of violations of the law committed by three prosecutors employed by the United States Department of Justice and dozens of additional infractions by several criminal investigators employed by the United States Department of the Treasury. Numerous

episodes euphemistically identified as "misconduct" and "improprieties" constitute felonies, 18 U.S.C. §§ 241 and 1512, 26 U.S.C. §§ 7213 and 7214. It is impossible to conclude that this Saturnalia of prosecutorial excesses, which included but was not limited to "grand jury abuse," does not create an appearance of impropriety rising beyond the level reached in *Young* to which the Tenth Circuit's harmless error analysis is equally insensitive; nor does the instant "misconduct" lend itself to assessment of its effects on the grand jury's deliberations any more readily than the ethical dilemma presented in *Young*, as noted by both the trial court and the dissent below. Finally, the threat to the fundamental values of the judicial system and society presented by the instant "willful, pervasive and egregious governmental misconduct" (Pet. App. 40a-42a), a characterization generous to the government, constitutes a danger to the fundamental values of society and the judicial system equal to racial discrimination in the selection of grand jurors. Tyranny is no less atrocious merely because it is color blind.

To support its argument that proof of prejudice to the defendant is an absolute prerequisite to dismissing an indictment, the government avers that it "would be unsound as a matter of policy [to] . . . dismiss [] an indictment for *procedural irregularities in the grand jury* [emphasis added to a euphemism that would make George Orwell gasp]. (GB at 22). In recently sustaining a constitutional challenge to criminal prosecutions pursuant to the Ethics in Government Act (28 U.S.C. §§ 49, 591-598) based on the separation of powers, the Court of Appeals for the District of Columbia discussed these matters of

policy, *In Re Sealed Case*, 838 F.2d 476, 487-489 (D.C. Cir. 1988):

> Authority to prosecute an individual is that government power which most threatens personal liberty, for a prosecutor "has the power to employ the full machinery of the state in scrutinizing any given individual. Even if a defendant is ultimately acquitted, forced immersion in criminal investigation and adjudication is a wrenching disruption of everyday life." *Young v. United States ex rel. Vuitton et Fils, S.A.*, — U.S. —, 107 S.Ct. 2124, 2141, 95 L.Ed.2d 740 (1987). The Framers of the Constitution were justly fearful of this power.
>
> • • •
>
> It may well be that the constitutional framework is awkward or burdensome in particular cases, but, under this system, efficiency is knowingly sacrificed in various ways so that liberty may be protected. Therefore, a law [and *a fortiori* a rule excusing violations of law to the same end] whose purpose is to ensure a more efficient or more trustworthy means for the state to prosecute crime than that contemplated by the Constitution comes into this Court with a heavy burden. *See Bowsher v. Synar*, — U.S. —, 106 S.Ct. 3181, 3193-94, 92 L.Ed.2d 583 (1986).

The government mistakenly claims support for its "policy argument" in *United States v. Mechanik*, 475 U.S. 66 (1986) a case where only a single "procedural irregularity" consisting of one violation of F.R.Crim.P 6(d) produced a deeply divided Court. Justice Rehnquist's majority opinion suggests little likelihood that the Court would countenance the matastic expansion of harmless error analysis to excuse the prosecutorial lawlessness catalogued here. In fact, the Court included the following *caveat* in *Mechanik*, 475 U.S. 66, 72:

> We express no opinion as to what remedy may be appropriate for a violation of Rule 6(d) that has affected the grand jury's charging decision and is brought to the attention of the trial court before the commencement of trial.

The several violations of Rule 6(d) in this case are far more serious than the one discussed in *Mechanik*. Furthermore, although several tandem appearances by IRS criminal investigators before this grand jury were not even attended by prosecutors, nor were they transcribed to enable us to determine what actually transpired, the 6(d) violations instanter constitute only one of nine broad categories of prosecutorial transgressions. It cannot be denied that the fulcrum for the Court's determination in *Mechanik* was the fact that review followed "a three-month trial conducted at enormous expense to the United States and the defendants." *Id.* at 69. The government fails to cite a single case involving *pre-trial* dismissal of an indictment, relying instead on *Mechanik*, which found the fact of a lengthy trial crucial to its *ratio decidendi*.

POINT II

THE GOVERNMENT'S SECOND MAJOR PREMISE TRIVIALIZES WILLFUL, REPEATED AND PERVASIVE, PROSECUTORIAL MISCONDUCT BY DISTORTION AND OMISSION

Under the rubric "[d]ismissal of the indictment would be inappropriate in this case even if an indictment may be dismissed without a showing of prejudice," (GB at 26), the government purports to enumerate and discuss the willful, repeated and pervasive prosecutorial misconduct found by two federal district judges and one dissenting circuit judge, i.e., the opinion of Chief Judge Holloway

of the Tenth Circuit, joined by district court Judge Bohanon, sitting by designation, constitutes the ruling of the Tenth Circuit below, notwithstanding the fact that three judges below have reached a contrary conclusion. By eisegesis, ellipsis, syllepsis, metonymy and catachresis, the government reduces a detailed account of prosecutorial lawlessness to "defects in the grand jury process" (GB at 9) and "procedural irregularities" (GB at 15).

Contrary to the government's argument, petitioners do not complain about misuse of the term "grand jury agent"; the misconduct disguised in this instance is the prosecution's willful and repeated misrepresentation as to the affiliation and bias of the "agents of the grand jury."[1] The grand jury was consistently reminded of the agents' uniquely created and described role and urged to rely upon the IRS special agents as their agents. These agents repeatedly expressed their "expert" opinions that

---

[1] This Court observed as recently as *Delaware v. Van Arsdall*, 475 U.S. —, 106 S.Ct. 1431, 1434, 89 L.Ed.2d 674 (1986), that the bias of a witness is 'always relevant as discrediting a witness and affecting the weight of his testimony.' The principle is implicated by the willful deception practiced upon the grand jury by Prosecutor Snyder and Special Agent Raybin on July 8, 1981 beginning at 9:11 a. m.:

> Whereupon, the following proceedings were had:
>
> MR. SNYDER: I would like to have him sworn in as an agent of the Grand Jury. What an agent of the grand jury means is to make very, very clear under the law that when he interviews people and he looks at this stuff, he is not looking at it so much as a special agent of the Criminal Investigation Division of the IRS, but he is looking at it as your agent and he is answerable to you and he is answerable to Rule 6. Do you recall Rule 6, the Grand Jury Secrecy?
>
> What it is, it is very, very plain and it states in what capacity he is operating in this investigation so there is no question about it. (JA-100).

the tax shelter arrangements at issue were illegal and these petitioners were guilty. (Pet. App. 52a-58a).

The remaining categories of misconduct set forth in the government's brief similarly misrepresent the record. "Presentation of summaries of evidence" (GB at 31) constitutes the elliptical substitution for findings by the district court (Pet. App. 76a-81a) that the purported summaries of evidence adduced before this grand jury were seriously false and misleading. This misconduct arguably constitutes felony violations, 18 U.S.C. § 241 and 26 U.S.C. § 7214(a)(7). (*See* Appendix).

"Mistreatment of an expert witness" (GB at 35) as found by all five judges below is rendered as "at worst a debate between two lawyers arising out of a disagreement as to legal theories . . ." (GB at 36). The intimidation of petitioners' tax law expert was sufficient to induce him to recant his testimony before the grand jury (G.J. Tr., Hjorth 7/20/82, 4:05 p.m.), leaving the unmistakable impression that his exculpatory analysis was false and had been purchased by petitioners. In this instance the prosecutor arguably committed felony witness intimidation proscribed by 18 U.S.C. § 1512(b)(1). (*See* Appendix).

"Granting informal immunity" (GB at 38), as the government phrases the issue, is followed by a discussion which omits the facts that (1) twenty-three (23) witnesses were beneficiaries of this procedure and (2) the testimony of at least one such witness was manipulated by the prosecutor's threats (Pet. App. 141a-142a), again arguably a felony, 18 U.S.C. § 1512(b)(1). The problem of prejudice posed by "[c]alling witnesses who asserted their privilege against compulsory self-incrimination" (GB at 39-41) is

camouflaged by the ensuing discussion's omission of the undisputed findings of record that (1) six of these witnesses were called after a grand juror candidly conceded that the grand jury was being prejudiced by the procedure and (2) the government falsely represented that petitioners were purchasing the witnesses' silence.

The "[a]lleged use of the grand jury to gather information for civil purposes" (GB at 43) is dismissed via reference to the following *non sequitur* provided by the appeals court: the grand jury's return of "an extensive indictment is probative evidence that it was not abused to obtain evidence for civil purposes." (GB at 43). But the record conclusively refutes this assertion. (Pet. App. 58a-64a; 88a-92a). The willful dissemination of this information constitutes a felony. 26 U.S.C. § 7213 (*See* Appendix).

"Disclosure of the identity of targets of the investigation" (GB at 46) along with the violation of *Massiah v. United States*, 377 U.S. 201 (1964) (GB at 49) and the imposition of secrecy obligations on two witnesses (GB at 47-49) could not have influenced the deliberations of the grand jury. But these illegal maneuvers were deliberately designed to injure petitioners and, in the case of the disclosures that petitioners were grand jury targets, succeeded in inflicting grave emotional and economic injury on petitioners. (26 U.S.C. § 6103, *see* Appendix). Obviously, harmless error analysis is not sensitive to this type of "prejudice" since it is not even considered. Willful disclosure of the identities of petitioners as grand jury targets constitutes the felonies of Unauthorized Disclosure of Information, 26 U.S.C. § 7213 (a)(1) and Conspiracy Against Right of Citizens, 18 U.S.C. § 241. (*See* Appendix). The *Massiah* violations may constitute felonies defined in 18 U.S.C. § 1512(b)(1) and (g). (*See* Appendix).

CONCLUSION

The Court held in *Stirone v. United States*, 361 U.S. 212, 218 (1960), that the grand jury was independent of either the prosecution or the judiciary and that the executive was powerless to initiate a criminal prosecution without the declaration that there is probable cause to support the indictment by an impartial grand jury after careful deliberation and strict adherence to rules designed as a means, not only of bringing to trial persons accused of public offense upon just grounds, but also as a means of protecting the citizen against unfounded accusation. *Ex parte Bain*, 121 U.S. 1, 11 (1887). As the Chief Justice observed in *Mechanik, supra*, at 71, "the moving finger writes; and, having writ, moves on." The independence of the grand jury is threatened. If this Court affirms the Tenth Circuit's decision, no accompanying exhortations, warnings or qualifications can prevent repetition of and citation to the events of this case. The imperative of judicial integrity and this Court's nomothetic function require reversal: actions speak lounder than words.

Respectfully submitted,

WILLIAM A. COHAN
Counsel of Record

COHAN & GREENE
1801 York Street
Denver, Colorado 80206
(303) 321-0999

Counsel for Petitioners
William A. Kilpatrick,
Declan J. O'Donnell and
Sheila C. Lerner

APPENDICES

18 U.S.C. Sec. 241. CONSPIRACY AGAINST RIGHTS OF CITIZENS

If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same;

• • •

They shall be fined not more than $10,000 or imprisoned not more than ten years, or both; and if death results, they shall be subject to imprisonment for any term of years or for life.

18 U.S.C. Sec. 1512. TAMPERING WITH A WITNESS, VICTIM, OR AN INFORMANT

• • •

(b) Whoever knowingly uses intimidation . . . or engages in misleading conduct toward another person, with intent to—

(1) influence, delay or prevent the testimony of any person in an official proceeding; . . . shall be fined not more than $250,000 or imprisoned not more than ten years, or both.

• • •

(f) in prosecution for an offense under this section, no state of mind need be proved with respect to the circumstance—

(1) that the official proceeding before a judge, court, magistrate, grand jury, or government agency is before

a judge or court of the United States, a United States magistrate, a bankruptcy judge, a Federal grand jury, or a Federal Government agency; or

(2) that the judge is a judge of the United States or that the law enforcement officer is an officer or employee of the Federal Government or a person authorized to act for or on behalf of the Federal Government or serving the Federal Government as an adviser or consultant.

(g) There is extraterritorial Federal jurisdiction of an offense under this Section.

26 U.S.C. Sec. 6103. CONFIDENTIALITY AND DISCLOSURE OF RETURNS AND RETURN INFORMATION

(b) Definitions. For purposes of this section—

• • •

(2) Return information. The term "return information" means—

(A) a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments, whether the taxpayer's return was, is being, or will be examined or subject to other investigation or processing, or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary with respect to a return or with respect to the determination of the existence, or possible existence, of liability (or the amount thereof) of any person under this title for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense,

. . . .

26 U.S.C. Sec. 7213. UNAUTHORIZED DISCLOSURE OF INFORMATION

(a) Returns and return information.

(1) Federal employees and other persons. It shall be unlawful for any officer or employee of the United States . . . willfully to disclose to any person, except as authorized in this title, any return or return information (as defined in section 6103(b)). Any violation of this paragraph shall be a felony punishable upon conviction by a fine in any amount not exceeding $5,000, or imprisonment of not more than 5 years, or both, together with the costs of prosecution, and if such offense is committed by any officer or employee of the United States, he shall, in addition to any other punishment, be dismissed from office or discharged from employment upon conviction for such offense.

26 U.S.C. Sec. 7214. OFFENSES BY OFFICERS AND EMPLOYEES OF THE UNITED STATES

(a) Unlawful acts of revenue officers or agents. Any officer or employee of the United States acting in connection with any revenue law of the United States—

• • •

(7) . . . who makes or signs any fraudulent . . . statement, or

• • •

shall be dismissed from office or discharged from employment and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or

both. The court may in its discretion award out of the fine so imposed an amount, not in excess of one-half thereof, for the use of the informer, if any, who shall be ascertained by the judgment of the court. The court also shall render judgment against the said officer or employee for the amount of damages sustained in favor of the party injured, to be collected by execution.

Supreme Court, U.S.
FILED
FEB 25 1988
JOSEPH F. SPANIOL, JR.
CLERK

Nos. 87-578 and 87-602

In The

Supreme Court of the United States

October Term, 1987

THE BANK OF NOVA SCOTIA,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

WILLIAM A. KILPATRICK, ET AL.,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, AMICUS CURIAE, IN SUPPORT OF THE PETITIONERS

SHELLEY I. GILMAN *
LARRY S. POZNER
Larry Pozner & Associates, P.C.
1890 Gaylord Street
Denver, Colorado 80206
(303) 333-1890

Counsel for Amicus Curiae National Association of Criminal Defense Lawyers

*Counsel of Record

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF AMICUS CURIAE	1
STATEMENT OF THE CASE	3
SUMMARY OF THE ARGUMENT	3
ARGUMENT	6
WHEN THE GOVERNMENT ENGAGES IN SERIOUS MISCONDUCT IN A GRAND JURY PROCEEDING, A FEDERAL COURT MAY, IN THE EXERCISE OF ITS SUPERVISORY POWER, DISMISS THE INDICTMENT IN ORDER TO PRESERVE THE INTEGRITY OF THE GRAND JURY PROCESS AND DETER FUTURE PROSECUTORIAL MISCONDUCT.	
CONCLUSION	27

TABLE OF AUTHORITIES

Page

Cases Cited:

Ballard v. United States, 329 U.S. 187 (1946) 12, 14

Branzburg v. Hayes, 408 U.S. 665 (1972) 7

Casey v. United States, 276 U.S. 413 (1928) 11

Chapman v. California, 386 U.S. 18 (1967) 16

Costello v. United States, 350 U.S. 359 (1956) 7

Delaware v. Van Arsdall, 475 U.S. 673 (1986) 16

Jencks v. United States, 353 U.S. 657 (1957) 14

Marshall v. United States, 360 U.S. 310 (1959) 13

McCarthy v. United States, 394 U.S. 459 (1969) 13

McNabb v. United States, 318 U.S. 332 (1943) 3, 10, 11, 12

Mesarosh v. United States, 352 U.S. 1 (1956) 14

Page

Olmstead v. United States, 277 U.S. 438 (1928) 11

United States v. Antonelli Fireworks, Co., 155 F.2d 631 (2d Cir. 1946) . . 23

United States v. Calandra, 414 U.S. 338 (1974) 7

United States v. Dionisio, 410 U.S. 1 (1978) 6

United States v. Hasting, 461 U.S. 499 (1983) 9, 15, 17, 20, 21

United States v. Kilpatrick, 821 F.2d 1456 (10th Cir. 1987) . 18, 22 25

United States v. Kilpatrick, 594 F.Supp. 1324 (1984). . . . 23

United States v. Nobles, 422 U.S. 225 (1975) 14

United States v. Mechanik, 475 U.S. 66 (1986) 20, 21 22, 27

United States v. Omni International Corp., 634 F.Supp. 1414 (D.Md. 1986). . 24

United States v. Payner, 447 U.S. 727 (1980) 9, 24, 27

United States v. Sears, Roebuck & Co., 719 F.2d 1386 (9th Cir. 1983). . 7-8, 9-10

Page

United States v. Serubo,
604 F.2d 807 (3rd Cir. 1979) . . 25, 26

Vasquez v. Hillery,
474 U.S. 254 (1986) 16

Wood v. Georgia,
370 U.S. 375 (1962) 6

Young v. United States ex rel. Vuitton
Et Fils S.A.,
__U.S.__, 107 S. Ct. 2124 (1987) . 14, 18
19, 20, 23

Constitutional Provisions Cited:

United States Constitution,
Fifth Amendment 5, 6

Rules Cited:

Federal Rules of Criminal Procedure,
Rule 6(d) 20, 22
Rule 6(e) 22

Other Authorities Cited:

S. Beale, Reconsidering Supervisory
Power in Criminal Cases: Constitutional and Statutory Limits
on the Authority of the Federal
Courts, 84 Colum. L. Rev. 1433
(1984) 15

Page

Note, The Exercise of Supervisory
Powers to Dismiss a Grand Jury
Indictment -- A Basis for Curbing
Prosecutorial Misconduct, 45
Ohio St. L. J. 1077 (1984) . . 9, 17,
18

Note, The Supervisory Power of the
Federal Courts, 76 Harv. L. Rev.
1656 (1963) 15

INTEREST OF AMICUS CURIAE

The National Association of Criminal Defense Lawyers, Inc. (NACDL) is a District Of Columbia non-profit corporation with a membership of more than five thousand lawyers from every state of the nation. The NACDL was founded over twenty-five years ago to promote study and research in the field of criminal defense law, to disseminate and advance the knowledge of law in the field of criminal defense practice, and to encourage the integrity, independence and expertise of the defense lawyer in criminal cases.

The NACDL also concerns itself with the promotion of the proper administration of criminal justice. Consequently, Amicus Curiae NACDL

submits this brief because this case presents important issues concerning the federal judiciary's ability to prevent and sanction serious prosecutorial misconduct in the grand jury system. The Amicus Curiae Committee of the NACDL has discussed this case and resolved that the issues in this case are of such importance to the criminal justice system that the NACDL should offer its assistance to the Court. The Petitioners, The Bank of Nova Scotia and William A. Kilpatrick, et al., and the Respondent, the United States of America, have consented to the NACDL's participation as amicus curiae, as evidenced by letters of consent that have been filed with this Court.

STATEMENT OF THE CASE

Recitations of the pertinent facts have been adequately set forth by the Petitioners in their respective briefs and are here adopted.

SUMMARY OF THE ARGUMENT

Over the past forty-five years, this Court has, in the exercise of its supervisory authority over the administration of criminal justice in the federal courts, "establish[ed] and maintain[ed] civilized standards of procedure and evidence." McNabb v. United States, 318 U.S. 332, 340 (1943). The Court's supervisory authority serves a twofold institutional purpose of preserving the integrity of the judicial process and deterring prosecutorial misconduct. A third purpose, the implementation of a remedy for a

violation of recognized rights, provides a means to vindicate the interests of the public by protecting it from lawless behavior or misconduct by the Government and maintaining the integrity of the criminal justice system.

When the Government engages in serious misconduct in a grand jury proceeding, or when such conduct has become pervasive and flagrant in a particular circuit, a federal court must be authorized to exercise its supervisory power and dismiss an indictment, despite the absence of demonstrable prejudice to the defendant. This exercise of supervisory power will preserve the public's confidence in the integrity of the grand jury process and will deter future prosecutorial misconduct.

The federal court's authority to

dismiss an indictment under its supervisory authority exists independent of its authority to dismiss an indictment under the Fifth Amendment to the Federal Constitution. If misconduct by the Government undermines a grand jury's ability to perform in an informed and unbiased manner and thereby results in actual prejudice to the defendant, the misconduct is remediable under the Fifth Amendment's grand jury and due process clauses. A remedy must also be available, however, where the Governmental misconduct is serious and pervasive but the defendant, in a pre-trial setting, is unable to demonstrate actual prejudice. What is at stake in that situation is the integrity of the judicial system. The Court's supervisory power is the only available protection for that integrity.

ARGUMENT

WHEN THE GOVERNMENT ENGAGES IN SERIOUS MISCONDUCT IN A GRAND JURY PROCEEDING, A FEDERAL COURT MAY, IN THE EXERCISE OF ITS SUPERVISORY POWER, DISMISS THE INDICTMENT IN ORDER TO PRESERVE THE INTEGRITY OF THE GRAND JURY PROCESS AND DETER FUTURE PROSECUTORIAL MISCONDUCT.

The Fifth Amendment provides that "[n]o person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." Implicit in that language is the guarantee of an informed and independent investigative body whose mission is to stand between the accuser and the accused to determine whether a charge is founded upon probable cause. United States v. Dionisio, 410 U.S. 1, 16-18 (1973); Wood v. Georgia, 370 U.S. 375, 390 (1962). This guarantee presupposes a grand jury that will "provide a fair method for instituting

criminal proceedings", Costello v. United States, 350 U.S. 359, 362 (1956), serve as a "protector of citizens against arbitrary and oppressive governmental action", United States v. Calandra, 414 U.S. 338, 343 (1974), and insulate citizens from unfounded prosecutions. Branzburg v. Hayes, 408 U.S. 665, 686 (1972).

If abuse or misconduct by a prosecutor undermines a grand jury's ability to perform its role in an informed and independent manner or to exercise its independent judgment in the charging decision, the dismissal of an indictment will be warranted in order to protect an individual defendant's constitutional rights. United States v. Sears, Roebuck & Co., 719 F.2d 1386 (9th Cir. 1983). In such cases, the focus will "not [be] on the degree of

culpability of the prosecutor, but on the impact of his misconduct on the grand jury's impartiality". Id. at 1392. In order to invoke the Court's authority to dismiss an indictment based on a violation of his own individual constitutional rights, a defendant must demonstrate that the prosecutor's conduct resulted in actual prejudice; i.e., that the grand jury's independence was so undermined that it could not make an informed and unbiased determination of probable cause. Id. at 1392.

The federal court possesses, independent of the authority to dismiss an indictment based on a violation of an individual defendant's constitutional rights, the authority to dismiss an indictment based on its supervisory power. The use of supervisory power promotes two institutional goals:

deterring prosecutorial misconduct and preserving the integrity of the judicial process. United States v. Payner, 447 U.S. 727, 736 n.8 (1980) A third goal, the implementation of a remedy for a violation of recognized rights, United States v. Hasting, 461 U.S. 499, 505 (1983), benefits the individual defendant. However, in this sense, "the individual defendant . . . serves only as a conduit for vindication of the public interest" and the dismissal of the indictment is only incidental to the public's primary interest in the deterrence of prosecutorial misconduct and the integrity of the criminal justice system. Note, The Exercise of Supervisory Powers to Dismiss a Grand Jury Indictment--A Basis for Curbing Prosecutorial Misconduct, 45 Ohio St. L.J. 1077, 1098 (1984)(quoting United

States v. Sears, Roebuck & Co., 719 F.2d at 1395 (Norris, J., dissenting in part)). Clearly, the goals underlying the court's supervisory power are separate and distinct from the goal of protecting a defendant's constitutional rights.

This Court has relied on its inherent supervisory power over the administration of justice in the federal courts as an independent basis for decision for the past forty-five years. This Court's first supervisory power decision, McNabb v. United States, 318 U.S. 332, 340 (1943), recognized the Court's duty to promulgate and maintain "civilized standards of procedure and evidence". These developing standards aimed to guard against "the misuse of the law enforcement process" and "the dangers of the overzealous as well as the

despotic". Id. at 343. They were designed as "an important safeguard--not only in assuring the protection of the innocent but also in securing conviction of the guilty by methods that commend themselves to a progressive and self-confident society." Id. at 344.[1] Significantly, in McNabb, the Court emphasized its primary concern for the

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[1]The opinion in McNabb reflects the Court's decision to dissociate itself from the unlawful investigative practices that had earlier been approved by the Court. The opinion further reveals the influence of Justice Brandeis' dissenting opinions in Casey v. United States, 276 U.S. 413, 425 (1928)(Brandeis, J., dissenting), and Olmstead v. United States, 277 U.S. 438, 485 (1928)(Brandeis, J., dissenting). In those dissenting opinions, Justice Brandeis cautioned that illegal government conduct "breeds contempt for law" and "invites every man to become a law unto himself". He further argued that the Court's ratification of illegal government conduct in order to secure the conviction of an accused "would bring terrible retribution". The common theme in Justice Brandeis' opinions was the protection of the criminal justice system "from the illegal conduct of its officers" and the preservation of "the purity of its courts".

purity of the criminal justice system and held that "a conviction resting on evidence secured through such a flagrant disregard of the procedure which Congress has commanded cannot be allowed to stand without making the courts themselves accomplices in wilful disobedience of law." Id. at 345.

In the several decades since the McNabb decision, this Court has continued to exercise its supervisory authority in federal cases to insure the integrity and fairness of the criminal justice system. In the vast majority of these cases, the Court has endeavored to formulate general rules of evidence and procedure, rather than remedy individual injustices. In Ballard v. United States, 329 U.S. 187 (1946), for example, the Court employed its supervisory power and dismissed indictments, finding that the

systematic exclusion of women from grand and petit jury panels departed from the scheme of jury selection adopted by Congress. Similarly, in Marshall v. United States, 360 U.S. 310 (1959), the Court dismissed an indictment because several trial jurors had been exposed to prejudicial newspaper articles about the defendant. Although each juror maintained that he would not be influenced by the articles, the Court exercised its supervisory power, finding that proper enforcement of the criminal law in the federal courts required a new trial.[2] The Court's primary concern in

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[2]Other cases exemplifying the Court's exercise of its supervisory power in the formulation of general rules of procedure and evidence are McCarthy v. United States, 394 U.S. 459 (1969)(the exercise of supervisory power in allowing a defendant to plead anew when a district judge accepted a guilty plea without fully adhering to the procedure set forth in Rule 11 of the Federal Rules of Criminal

the exercise of its supervisory power has been the integrity of the criminal justice system. As the Court aptly noted in Ballard v. United States, 329 U.S. at 195,

> The injury is not limited to the defendant--there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts.

The Court further commented in Mesarosh v. United States, 352 U.S. 1, 14 (1956), that the Court's duty in exercising supervisory jurisdiction over federal court proceedings was "to see that the waters of justice are not polluted."

Procedure); United States v. Nobles, 422 U.S. 225 (1975) and Jencks v. United States, 353 U.S. 657 (1957)(the exercise of supervisory power in the regulation of discovery and disclosure); Young v. U.S. ex rel. Vuitton et Fils S.A., ___ U.S. ___, 107 S.Ct. 2124 (1987)(the exercise of supervisory power in requiring a new trial when the prosecutor in a contempt proceeding was counsel for an interested party in the underlying civil litigation).

These cases clearly illustrate that "the courts have an interest in judicial integrity that is distinct from their duty to enforce the rights of the litigants." S. Beale, Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts, 84 Colum. L. Rev. 1433, 1453 (1984). See also Note, The Supervisory Power of the Federal Courts, 76 Harv. L. Rev. 1656, 1659 (1963)("the supervisory-power decisions reflect concern about the degree of fairness in the judicial process", allowing the court "the new-found freedom to ignore whether particular litigants were harmed by the asserted error").

In United States v. Hasting, 461 U.S. 499 (1983), this Court considered the invocation of its supervisory power

in cases where the claimed error was "harmless"[3] and the matter has proceeded through trial. The Court noted that the exercise of its supervisory power should be approached with some caution, after balancing the interests involved, including the interest in the prompt administration of justice and the interests of the victims. The Court held that when the error was harmless and minimal, the countervailing interest in the finality of the conviction outweighed

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[3]Under the "harmless-error doctrine", some constitutional errors in the context of a particular case are so "unimportant and insignificant" that they properly may be deemed harmless, not requiring the automatic reversal of a conviction. Chapman v. California, 386 U.S. 18, 22 (1967). However, the harmless-error doctrine can never be applied to errors that are "so fundamental and pervasive that they require reversal without regard to the facts or circumstances of the particular case", Delaware v. Van Arsdall, 475 U.S. 673, 681 (1986), or that undermine "the structural integrity of the criminal tribunal itself." Vasquez v. Hillery, 474 U.S. 254, 263-64 (1986).

the interests in preserving the integrity of the system and deterring future misconduct.[4] The Court further noted that, in such cases, the impact on the integrity of the system was negligible and other methods to deter the objectionable conduct existed.

Implicit in this Court's decision in Hasting is that the "harmlessness" of the alleged misconduct is an element to be considered. However, Hasting does not hold that the exercise of supervisory power is barred in cases involving a harmless error.[5] Note, The Exercise of

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[4]In Hasting, the claimed error involved a prosecutor's allusion to the defendants' failure to rebut the Government's evidence. The Court noted that the prosecutor's remark was "at most an attenuated violation" of a constitutional provision. Id. at 506.

[5]As Circuit Judge Seymour remarked in her dissenting opinion, "although harmlessness of the alleged misconduct is an element to be balanced against the desired result, it is not always

Supervisory Powers to Dismiss a Grand Jury Indictment--A Basis for Curbing Prosecutorial Misconduct, supra, at 1087. This Court's decision in Young v. United States ex rel. Vuitton Et Fils S.A., ___ U.S. ___, 107 S.Ct. 2124 (1987) is dispositive of this point. There, a district court appointed a private attorney to prosecute a contempt action against the petitioners. The private attorney was counsel for an interested party in the civil litigation underlying the contempt action. The Court reversed the petitioners' contempt convictions, holding that the exercise of its supervisory power was appropriate because of the potential for the

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dispositive. If the exercise of supervisory power were per se precluded by a finding of lack of prejudice, a balancing process would never be necessary." United States v. Kilpatrick, 821 F.2d 1456, 1478 (10th Cir. 1987)(Seymour, J., dissenting).

attorney's private interest to influence the discharge of his public duty:

> [T]he appointment of counsel for an interested party to bring the contempt prosecution in this case at a minimum created opportunities for conflicts to arise, and created at least the appearance of impropriety. (emphasis in original)

Id. at ___, 107 S.Ct. at 2137. In so ruling, the Court emphasized its preeminent concern "in ensuring that contempt proceedings are conducted in a manner consistent with basic notions of fairness" and in prohibiting even the appearance of impropriety in the administration of justice. Id. at ___, 107 S.Ct. at 2138. Implicitly, the Court reached its conclusion without granting the Government an opportunity to demonstrate that it was harmless error for the court to make the challenged

appointment.[6]

Most recently, in United States v. Mechanik, 475 U.S. 66 (1986), this Court examined the post-trial exercise of its supervisory power to sanction an isolated prosecutorial violation of Rule 6(d)[7] in the grand jury proceedings. The Court applied the balancing test earlier enunciated in Hasting and held that the petit jury's verdict of guilty rendered

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[6]In the majority opinion, this Court did not expressly address the harmless-error doctrine in relation to the facts of the case. However, the plurality of the Court found that a concern for the demonstration of actual prejudice was inappropriate since "what [was] at stake [was] the public perception of the integrity of our criminal justice system". Young v. United States ex rel. Vuitton Et Fils S.A., ___ U.S. at ___, 107 S. Ct. at 2140.

[7]Rule 6(d) of the Federal Rules of Criminal Procedure provides that only specified persons, including "the witness under examination", may be present while the grand jury is in session.

harmless any errors in the grand jury process. Significantly, the Court placed great emphasis on the societal costs of reversal and retrial, including the impact on jurors, witnesses, courts, the prosecution, and the defendants. However, the Court left unanswered the issue of whether it would exercise its supervisory power to sanction misconduct that had occurred in the grand jury proceedings and was brought to a court's attention before the commencement of trial. United States v. Mechanik, 475 U.S. at 72.

Neither Hasting nor Mechanik bar a court from the pre-trial exercise of its supervisory power and the dismissal of an indictment, without a showing of prejudice, when conduct by a prosecutor threatens to undermine confidence in the integrity of the grand jury proceeding.

As Circuit Judge Seymour noted in the instant case,

> such a requirement would render a court's supervisory power superfluous because misconduct that does affect the grand jury's independence is a constitutional violation remediable under the Fifth Amendment.

United States v. Kilpatrick, 821 F.2d 1456, 1479 (1987)(Seymour, J., dissenting). Additionally, such a requirement would render Rules 6(d) and(e) of the Federal Rules of Criminal Procedure "a dead letter", see United States v. Mechanik, 475 U.S. at 73 (O'Connor, J., concurring in judgment), and allow serious prosecutorial misconduct to go undisciplined. Merely denouncing the Government's misconduct and then allowing the results of that misconduct to stand would amount to "a ritualistic verbal spanking", and "a condonation of counsel's alleged offense,

coupled with verbal reprobation".[8] United States v. Antonelli Fireworks, Co., 155 F.2d 631, 661 (2d Cir. 1946)(Frank, J., dissenting).

When the Government engages in serious misconduct in a grand jury proceeding, "[a] concern for actual prejudice. . .misses the point, for what is at stake is the public perception of the integrity of our criminal justice system." Young v. United States ex rel. Vuitton Et Fils S.A., ___ U.S. at ___, 107 S.Ct. at 2140 (Brennan, J., plurality). Although an individual

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[8]In the instant case, the district court's disapproval of the Government's misconduct had virtually no effect on the Government attorneys, as noted by District Judge Kane in his opinion: "What is perhaps most alarming is that even in the very last of so many hearings, one of the prosecuting attorneys continued to refer to the challenge to his and his colleagues conduct as 'silly' and 'frivolous'". United States v. Kilpatrick, 594 F.Supp. 1324, 1352-53 (1984).

defendant may benefit from the exercise of a court's supervisory power in such a case, the invocation of the power is not to vindicate that defendant's individual rights, but rather to preserve the integrity of the grand jury system and to deter future prosecutorial misconduct. United States v. Omni International Corp., 634 F.Supp. 1414, 1438 (D.Md. 1986). If an indictment is permitted in the face of serious prosecutorial misconduct in the grand jury process, the federal court "places its imprimatur upon such lawlessness and thereby taints its own integrity." United States v. Payner, 447 U.S. at 746 (Marshall, J., dissenting).

Certainly, a federal court must proceed "with some caution" in exercising its supervisory power to dismiss an indictment. United States v. Payner, 447

U.S. at 734-35. However, when the prosecutor's misconduct is "something other than an isolated incident unmotivated by sinister ends", or such misconduct has become pervasive and flagrant in the particular circuit, the dismissal of an indictment in the exercise of its supervisory authority is an appropriate sanction, "despite the absence of prejudice to the defendant". United States v. Serubo, 604 F.2d 807, 817 (3d Cir. 1979). In such cases, "[p]rejudice to the integrity of the judicial system should be sufficient." United States v. Kilpatrick, 821 F.2d at 1479 (Seymour, J., dissenting). If a federal court's supervisory authority is to have any viability, the court must be authorized to dismiss an indictment, absent a showing of actual prejudice, in cases of serious prosecutorial

misconduct.[9] In determining whether challenged prosecutorial conduct warrants dismissal of an indictment, this Court should employ the test enunciated by the Third Circuit in United States v. Serubo, 604 F.2d at 817:

> [D]ismissal of the indictment may be proper even where no actual prejudice has been shown, if there is evidence that the challenged activity was something other than an isolated incident unmotivated by sinister ends, or that the type of misconduct challenged has become "entrenched or flagrant" in the circuit.

The invocation of a court's supervisory power in cases meeting the Third Circuit test would promote the public's confidence in the integrity of the grand

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[9]This is particularly so in the context of grand jury proceedings. The grand jury is an ex parte proceeding, where opposing counsel is not present to interpose contemporaneous objections to governmental misconduct. Accordingly, unless these objections can be raised and sanctioned post-indictment and pre-trial, the misconduct will go undisciplined.

jury system and deter future misconduct by Government attorneys. The supervisory power must be exercised in such cases for a court cannot stand idly by, thereby becoming "the accomplice of the Government lawbreaker." United States v. Payner, 447 U.S. at 748 (Marshall, J., dissenting).

CONCLUSION

In the case at bar, the record is replete with evidence of serious and repeated misconduct by the Government attorneys. Unlike Mechanik, the challenged conduct consists of more than an isolated, technical violation of the Federal Rules of Criminal Procedure and was brought to the court's attention prior to trial. Accordingly, Amicus Curiae, the National Association of Criminal Defense Lawyers, for the reasons

stated herein, respectfully requests that this Court reverse the Court of Appeals for the Tenth Circuit, and hold that the District Court properly exercised its supervisory power in dismissing the indictment.

Respectfully submitted,

Shelley I. Gilman

SHELLEY I. GILMAN *
LARRY S. POZNER
Larry Pozner & Associates, PC
1890 Gaylord Street
Denver, Colorado 80206
(303) 333-1890

Counsel for Amicus Curiae
National Association of
Criminal Defense Lawyers

*Counsel of Record

Dated: February 25, 1988.

Nos. 87-578, 87-602

Supreme Court, U.S.
FILED
FEB 25 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

THE BANK OF NOVA SCOTIA, *Petitioner*,

—v.—

UNITED STATES OF AMERICA, *Respondent*.

WILLIAM A. KILPATRICK, *et al.*, *Petitioners*,

—v.—

UNITED STATES OF AMERICA, *Respondent*.

ON WRITS OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION AND THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF COLORADO IN SUPPORT OF PETITIONERS

JOHN A. POWELL
(Counsel of Record)
HELEN HERSHKOFF
STEVEN R. SHAPIRO
American Civil Liberties Union Foundation
132 West 43 Street
New York, New York 10036
(212) 944-9800

DAVID H. MILLER
American Civil Liberties Union Foundation of Colorado
815 East 22 Avenue
Denver, Colorado 80205
(303) 861-2258

RICHARD F. ZIEGLER
MARTHA F. DAVIS
CLEARY, GOTTLIEB, STEEN & HAMILTON
One State Street Plaza
New York, New York 10004
(212) 344-0600

QUESTION PRESENTED

Whether a federal district court may exercise its supervisory power to dismiss an indictment before trial, absent proof of actual prejudice to the defendant, where prosecutorial misconduct of the grand jury process is so repeated and egregious as to undermine the integrity of the criminal justice system.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF AMICI AND SUMMARY OF ARGUMENT 1

ARGUMENT 5

I. THE DISTRICT COURTS MUST BE AUTHORIZED TO DISMISS AN INDICTMENT BEFORE TRIAL WHERE WILLFUL AND REPEATED PROSECUTORIAL MISCONDUCT IN THE GRAND JURY PROCESS UNDERMINES THE INTEGRITY OF THE CRIMINAL JUSTICE SYSTEM 5

A. The Grand Jury is Essential to the of the Criminal Justice System 5

B. Supervisory Authority Over the Grand Jury Process Allows the Federal Courts to Ensure and Enhance The Integrity of the Criminal Justice System . . 9

C. Federal District Courts Must be Authorized to Dismiss an Indictment Before Trial, Absent Proof of Actual Prejudice, Where Prosecutorial Misconduct Impairs The Integrity Of The Criminal Justice System 13

Page

II. THE PRACTICAL IMPOSSIBILITY OF PROVING ACTUAL PREJUDICE WOULD ELIMINATE DETERRENCE OF PROSECUTORIAL MISCONDUCT IN MANY CASES OF ABUSE. 23

A. Prosecutorial Misconduct Can Dramatically Impair Public Confidence Even if a Particular Defendant Does Not or Cannot Prove Actual Prejudice 24

B. Actual Prejudice Is Difficult If Not Impossible to Prove 32

CONCLUSION 36

TABLE OF AUTHORITIES

Page

Ballard v. United States,
329 U.S. 187 (1946) 3, 12

Berger v. United States,
295 U.S. 78 (1935) 7, 8

Blair v. United States,
250 U.S. 273 (1919) 27

Branzburg v. Hayes,
408 U.S. 665 (1972) 6, 30

Communist Party v. Subversive Activities Control Board,
351 U.S. 115 (1956) 10

Costello v. United States,
350 U.S. 359 (1956) 6

In re Murchison,
349 U.S. 133 (1955) 12

In re November 1979 Grand Jury,
616 F.2d 1021 (7th Cir. 1980) 20

Lockhart v. McCree,
476 U.S. 162 (1986) 19

Marshall v. United States,
360 U.S. 310 (1959) 34

McNabb v. United States,
318 U.S. 332 (1943) 12

Page

Olmstead v. United States,
277 U.S. 438 (1928) 11

Peters v. Kiff,
407 U.S. 493 (1972) 12

Pittsburgh Plate Glass
v. United States,
360 U.S. 395 (1959) 34

Smith v. Phillips,
455 U.S. 209 (1982) 33

Taylor v. Louisiana,
379 U.S. 466 (1965) 12, 26

Tumey v. Ohio,
273 U.S. 510 (1927) 12

United States v. Al Mudarris,
695 F.2d 1182 (9th Cir.),
cert. denied, 461 U.S. 932 (1983) . . . 23

United States v. Andrews,
444 F.Supp. 1238 (E.D.Mich. 1978) . . . 17

United States v. Asdrubal-Herrera,
470 F.Supp. 939 (N.D.Ill. 1979) 14

United States v. Calandra,
414 U.S. 338 (1974) 6

United States v. Crocker,
568 F.2d 1049 (3d Cir. 1977) 15, 16

United States v. Dardi,
330 F.2d 316 (2d Cir. 1964) 27

Page

United States v. DeFabritus,
605 F.Supp. 1538 (S.D.N.Y. 1985) 14

United States v. DiGrazia,
213 F.Supp. 232 (N.D.Ill. 1963) 17

United States v. Doss,
545 F.2d 548 (6th Cir. 1976) 28

United States v. Estepa,
471 F.2d 1132 (2d Cir. 1972) 19, 21

United States v. Gallo,
394 F.Supp. 310 (D.Conn. 1975) . . . 20, 22

United States v. Gold,
470 F.Supp. 1336 (N.D.Ill. 1979) . . 17, 20

United States v. Hinton,
543 F.2d 1002 (2d Cir. 1976),
cert. denied, 429 U.S. 1066 (1977) . . . 33

United States v. Hogan,
712 F.2d 757 (2d Cir. 1983) . . 6, 15, 25

United States v. Kazonis,
391 F.Supp. 804 (D. Mass. 1975),
aff'd, 530 F.2d 962 (1st Cir.),
cert. denied, 429 U.S. 826 (1976) . . . 14

United States v. Mechanik,
475 U.S. 66 (1986) 3

United States v. Omni
International Corp.,
634 F.Supp. 1414 (D.Md. 1986) 17

Page

United States v. Pignatiello,
582 F.Supp. 251 (D.Col. 1984) 34

United States v. Pino,
708 F.2d 523 (10th Cir. 1983) 22

United States v. Procter & Gamble,
356 U.S. 677 (1958) 35

United States v. Samango,
607 F.2d 877 (9th Cir. 1979) 15

United States v. Sears,
Roebuck & Co.,
579 F.Supp. 1055 (C.D.Cal. 1984) 34

United States v. Sells
Engineering, Inc.,
463 U.S. 418 (1983) 2

United States v. Serubo,
604 F.2d 807 (3d Cir. 1979) . . 10, 15, 18

Vasquez v. Hillery,
474 U.S. 254 (1986) 18

Wood v. Georgia,
370 U.S. 375 (1962) 7

Young v. United States,
107 S.Ct. 2124 (1987) . . 2, 12, 24-26, 36

Rules

Federal Rules of Criminal Procedure
Rule 6(d) 34
Rule 6(e) 34

Page

Legislative History

Grand Jury Disclosure: Hearings
on S.1676 before the Senate
Committee on the Judiciary,
99th Cong. (Nov. 19, 1985) 25

Grand Jury Reform: Hearings
before the Subcommittee on
Immigration, Citizenship and
International Law," of the House
of Representatives Committee on
the Judiciary, 95th Cong.
(Mar. 17 - June 29, 1977) 25

Other Authorities

M. Frankel & G. Naftalis,
The Grand Jury 120 (1977) 26

Note, Double Jeopardy,
Due Process, and the Breach
f Plea Agreements,
87 Colum.L.Rev. 142 (1987) 26

Note, The Exercise of
Supervisory Powers to Dismiss
a Grand Jury Indictment,
45 Ohio St. L.J. 1077 (1984) . . 8, 31, 33

Note, The Supervisory Power
of the Federal Courts,
76 Harv.L.Rev. 1656 (1963) 11

INTEREST OF AMICI AND SUMMARY OF ARGUMENT[1/]

The American Civil Liberties Union Foundation (ACLU) is a nationwide, non-partisan organization of more than 250,000 persons dedicated to protecting and preserving the civil rights and civil liberties guaranteed by law. The ACLU Foundation of Colorado is one of its state affiliates.

Since its creation 60 years ago, the ACLU has worked to ensure the integrity and independence of the criminal justice system. Within that system, "[t]he grand jury has always occupied a high place as an instrument of justice . . . -- so much so that it is enshrined in the Constitution."

1/ Letters of consent to the filing of this brief are being filed with the Clerk of the Court pursuant to Rule 36.2 of the Rules of this Court.

United States v. Sells Engineering, Inc., 463 U.S. 418, 423 (1983). This Court has "consistently stood ready to defend [the grand jury] against unwarranted intrusion," id. at 425, "find[ing] actual prejudice [to the defendant] irrelevant," Young v. United States, 107 S.Ct. 2124, 2138-39 n. 21 (1987), where the integrity of the criminal justice system is at stake.

This case involves the supervisory authority of the federal district courts to dismiss an indictment before trial where prosecutorial misconduct in the grand jury process is so egregious as to "undermine[] confidence in the integrity of the criminal proceeding." See id. at 2137. Under such circumstances, the injury to the grand jury process is "not limited to the defendant" but rather extends "to the jury system, to the law as an institution, to the community

at large, and to the democratic ideal reflected in the processes of our courts." Ballard v. United States, 329 U.S. 187, 195 (1946).

The decision of the Tenth Circuit impermissibly deprives the federal district courts of supervisory authority to dismiss an indictment prior to trial absent proof of actual prejudice to the defendant. This new and unwarranted standard effectively eliminates the power of district judges to deter prosecutorial misconduct before the grand jury.2/

Certain instances of egregious prosecutorial misconduct can dramatically

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2/ In United States v. Mechanik, 475 U.S. 66, 72 (1986), Justice Rehnquist's majority opinion specifically left open the question of whether the federal district courts may exercise supervisory authority to dismiss an indictment before trial because of prosecutorial misconduct in the grand jury process absent proof of actual prejudice to the defendant.

affect the integrity of the criminal justice system even if a particular defendant cannot or does not prove actual prejudice. "Harmless error" analysis, which focuses exclusively on prejudice to the particular defendant, overlooks not only the effect of such misconduct on the criminal justice system, but also the problems that accompany proof of actual prejudice. As such, the analysis is dangerously inappropriate. Because the federal district courts must not be deprived of remedies that they need to exercise supervisory authority over the grand jury process -- in order to promote public respect as well as the integrity of the criminal justice system -- the ACLU submits this brief amici curiae in support of petitioners.

ARGUMENT

I. THE DISTRICT COURTS MUST BE AUTHORIZED TO DISMISS AN INDICTMENT BEFORE TRIAL WHERE WILLFUL AND REPEATED PROSECUTORIAL MISCONDUCT IN THE GRAND JURY PROCESS UNDERMINES THE INTEGRITY OF THE CRIMINAL JUSTICE SYSTEM

This case raises important questions about the function of the grand jury and the ability of district judges, exercising their supervisory authority, to curb prosecutorial abuse of the grand jury process.

A. The Grand Jury is Essential to the of the Criminal Justice System

The need for supervisory authority to dismiss an indictment before trial because of prosecutorial misconduct relates inextricably to the role of the grand jury within our system of criminal justice. The

historic role of the grand jury, of course, is "to provide a fair method for instituting criminal proceedings," Costello v. United States, 350 U.S. 359, 362 (1956), to serve "as a protector of citizens against arbitrary and oppressive governmental action," United States v. Calandra, 414 U.S. 338, 343 (1974), and to assure the "protecting [of] citizens against unfounded criminal prosecutions." Branzburg v. Hayes, 408 U.S. 665, 686-87 (1972).

Convening "as a body of lay persons acting in secret," United States v. Hogan, 712 F.2d 757, 759 (2d Cir. 1983), the grand jury must not only be "independent and informed," but must also "stand between the accuser and the accused . . . to determine whether a charge is founded upon reason or dictated by an intimidating

power or by malice and personal ill will." Wood v. Georgia, 370 U.S. 375, 390 (1962).

In fulfilling its constitutional mandate, the grand jury is especially dependent upon the prosecutor throughout the course of its proceedings. In principle, as this Court has explained,

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.

Berger v. United States, 295 U.S. 78, 88 (1935). The prosecutor "draws up the indictment, calls and examines the grand jury witnesses, advises the grand jury as to the law, and is in constant attendance

during its proceedings." United States v. Hogan, 712 F.2d 757, 759 (2d Cir. 1983). "By virtue of their position," as one court acknowledges, prosecutors have "gained such influence over grand juries that these bodies' historic independence has been eroded." Ibid. One commentator states:

> [A] prosecutor can greatly influence the grand jury because he or she controls the proceedings and the flow of information. This unbounded influence has led critics to characterize the grand jury as a "rubber stamp" of the prosecutor. These critics fear that jurors passively accept whatever a prosecutor presents. The jurors are inexperienced in legal matters and therefore are inclined to rely improperly on the prosecutor.

Note, The Exercise of Supervisory Powers to Dismiss a Grand Jury Indictment, 45 Ohio St. L.J. 1077, 1079-80 (1984).

The fact that grand jury proceedings are secret and ex parte magnifies legitimate concerns about the influence of the prosecutor on the independence and impartiality of the grand jury. Public confidence thus requires that prosecutors respect and abide the constitutional, statutory and judicial limits imposed on their conduct during the grand jury process. When the purposes of the grand jury are undermined by severe, deliberate and repeated instances of prosecutorial misconduct, the credibility and integrity of the criminal justice system are themselves put at risk.

B. Supervisory Authority Over the Grand Jury Process Allows the Federal Courts to Ensure and Enhance The Integrity of the Criminal Justice System

The federal courts have an interest "in preserving and protecting the

appearance and the reality of fair practice before the grand jury . . . ." United States v. Serubo, 604 F.2d 807, 817 (3d Cir. 1979). This important institutional interest is separate and "independent of [the judiciary's] concern for the rights of the particular defendant." Ibid.

This Court has repeatedly recognized that "[t]he untainted administration of justice is . . . one of the most cherished aspects of our institutions," Communist Party v. Subversive Activities Control Board, 351 U.S. 115, 124 (1956), requiring "the Court to make certain that the doing of justice be made so manifest that only irrational or perverse claims of its disregard can be asserted." Ibid. As Justice Brandeis warned in an analogous context, lawless government behavior "breeds contempt for the law" and "invites

every man to become a law unto himself." Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

Use of the district court's supervisory authority to promote this important institutional interest has, with good reason, traditionally not required proof of actual prejudice to the defendant. See generally Note, The Supervisory Power of the Federal Courts, 76 Harv.L.Rev. 1656, 1657 (1963). An emphasis on actual prejudice ignores important institutional values in the criminal justice system that are distinct from the individual rights of a particular defendant. Forms of misconduct harmless to the particular defendant can nevertheless have a deleterious effect on public respect for the criminal justice system, as well as on the continued viability of that system.

Deterrence of such misconduct is a legitimate concern of courts responsible for "maintaining civilized standards of procedure and evidence in the administration of criminal justice." McNabb v. United States, 318 U.S. 332, 340 (1943).3/

3/ The Fourteenth Amendment does not require a criminal defendant to show "actual bias in the tribunal . . . ; due process is denied by circumstances that create the likelihood of appearance of bias." Peters v. Kiff, 407 U.S. 493, 502 (1972). See In re Murchison, 349 U.S. 133, 136 (1955)("Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness"); see also Taylor v. Louisiana, 379 U.S. 466 (1965); Tumey v. Ohio, 273 U.S. 510 (1927). Similarly, "[w]here the interest infringed is sufficiently important . . . [this Court has] not hesitated to find actual prejudice irrelevant when utilizing supervisory authority." Young v. United States, 107 S.Ct. at 2138-39 n.21, citing Ballard v. United States, 329 U.S. at 187.

C. Federal District Courts Must be Authorized to Dismiss an Indictment Before Trial, Absent Proof of Actual Prejudice, Where Prosecutorial Misconduct Impairs The Integrity Of The Criminal Justice System

District judges possess supervisory authority not for the purpose of punishing prosecutors but rather to ensure that the criminal justice system works the way it is designed to work. They are in the best position to know when the criminal justice system has broken down because they work on a daily basis with the assistants in the office of the United States Attorney. When such a breakdown occurs, it is absolutely critical that the lower court retain not only authority to dismiss criminal indictments as a deterrent, but also discretion to determine when such a deterrent is necessary to preserve the integrity of the criminal justice system.

Dismissal of the indictment before trial because of prosecutorial abuse is obviously a serious step. There is no evidence, however, that it is taken lightly by district judges. Rather, the sanction is used with "extreme caution," see United States v. Asdrubal-Herrera, 470 F.Supp. 939, 942 (N.D. Ill. 1979). The published cases show that successful motions to dismiss because of serious irregularities in prosecutorial behavior are, in fact, rare. See e.g., United States v. DeFabritus, 605 F.Supp. 1538, 1543 (S.D.N.Y. 1985); United States v. Kazonis, 391 F.Supp. 804, 805 (D. Mass. 1975), aff'd, 530 F.2d 962 (1st Cir.), cert. denied, 429 U.S. 826 (1976).

Rather, the lower courts exercise supervisory authority to dismiss only "when government conduct has placed in jeopardy

the integrity of the criminal justice system," United States v. Samango, 607 F.2d 877, 884 (9th Cir. 1979), or "if there is evidence that the challenged activity was something other than an isolated incident unmotivated by sinister ends," United States v. Serubo, 604 F.2d at 817, or if the incidents of prosecutorial misconduct were "flagrant and unconscionable." United States v. Hogan, 712 F.2d at 762.

In United States v. Crocker, 568 F.2d 1049 (3d Cir. 1977), for example, the court declined to dismiss an indictment where the United States Attorney had failed to inform a target defendant that he was the subject of a grant jury investigation. The court warned, however, that dismissal would be appropriate if similar

prosecutorial inaction tainted future grand jury proceedings:

> [T]here is no suggestion that the practice of giving such warnings is long-established among the United States Attorneys of this Circuit . . . . [W]e have recognized that we have supervisory authority over the conducting of grand jury proceedings, [but] we have declined to exercise that power to require warnings of a statutory recantation right . . . . Thus in the future, United States Attorneys in the Third Circuit should not be surprised if, pursuant to our supervisory powers over the manner of conducting grand jury proceedings, we were to [dismiss an indictment for failure to warn] where, as here, specific inquiry is made on the defendant's behalf.

Id. at 1056. Adherence to this strict standard ensures that the judiciary's supervisory power in no way encroaches on the prerogatives of the other branches of government.

"Sparing use, of course, does not mean no use," as stated in an analogous context by the district court in United States v. Omni International Corp., 634 F.Supp. 1414, 1438 (D.Md. 1986). "Even 'disfavored remedies'. . . must be used in certain situations." Ibid. In the extreme case, the United States Attorney may fail to "recognize[] that . . . [h]e or she is 'an administrator of justice,'" see United States v. Gold, 470 F.Supp. 1336, 1347 (N.D.Ill. 1979), quoting United States v. Andrews, 444 F.Supp. 1238, 1244 (E.D. Mich. 1978), and act out of "zeal, malice, partiality or other prejudice." United States v. DiGrazia, 213 F.Supp. 232, 235 (N.D.Ill. 1963). Where the district court faces repeated instances of prosecutorial misconduct, uncorrected despite admonition from the bench, "judicial 'tongue clicking'

and adjurations as to the 'better practice' are likely to have little impact on the problem." United States v. Serubo, 604 F.2d at 817-18.

Under such circumstances, disciplinary actions or contempt proceedings will also not be adequate to preserve the integrity of the judicial system. The federal district courts have little, if any, control over disciplinary proceedings and, in any event, many instances of misconduct are not subject to contempt sanctions. See e.g., Vasquez v. Hillery, 474 U.S. 254, 262 & n.5 (1986).

In the extreme or egregious case, therefore, where prosecutorial misconduct or abuse is cumulative and repeated, dismissal is the only effective deterrent to preserve the integrity of the judicial process. As Judge Friendly explained in a

similar context, "a reversal with instructions to dismiss the indictment may help to translate the assurances of the United States Attorneys into consistent performance by their assistants." United States v. Estepa, 471 F.2d 1132, 1137 (2d Cir. 1972) (Friendly, J.).

As demonstrated by the following decisions, supervisory authority to dismiss the indictment before trial cannot and should not be limited to situations in which actual prejudice can be shown. Even in extreme cases, a number of reasons may preclude proof of actual prejudice. This Court has recognized, however, in analogous jury contexts, that the difficulty of establishing prejudice does not mean that the error is harmless. See Lockhart v. McCree, 476 U.S. 162 (1986).

In United States v. Gold, 470 F.Supp. at 1336, for example, the district court dismissed the indictment, following an evidentiary hearing that revealed "extraordinary facts," see In re November 1979 Grand Jury, 616 F.2d 1021, 1023 (7th Cir. 1980), including the prosecutor's conflict of interest, the withholding of exculpatory evidence, the destruction of potentially relevant evidence, improper testimony as a witness before the grand jury, and improper comments on the exercise of constitutional rights. "These circumstances," the district court stated, "revealing as they are, disclose a totality of grand jury abuse by government attorneys." United States v. Gold, 470 F.Supp. at 1355-56.

In United States v. Gallo, 394 F.Supp. 310 (D.Conn. 1975), the district court

likewise granted a motion to dismiss where the prosecutor obtained a second indictment by submitting to the grand jury transcripts of witness testimony before a prior grand jury. Over the preceding decade, the Circuit had issued a series of decisions "condemn[ing] the casual attitude with respect to the presentation of evidence manifested by the decision of the Assistant United States Attorney to rely on [hearsay] testimony," United States v. Estepa, 471 F.2d at 1135. In equal measure, the district court had warned against the use of hearsay where first-hand information from live witnesses was readily available. Nevertheless, the prosecutor relied on selective portions of a grand jury transcript that was known to be "permeated with perjurious statements as to crucial, material events," without advising

the grand jury as to the hearsay quality of the evidence presented. United States v. Gallo, 394 F.Supp. at 315. Granting the motion to dismiss, the district court made clear that other, less drastic sanctions had failed to achieve their desired effect:

> In the exercise of its supervisory powers over the conduct of judicial business in this District, this Court must not condone the actions of the prosecutor in the case at bar with "yet another admonition."

Id. at 316 (citations omitted).

The district courts have thus recognized that dismissal is a sanction to be used cautiously, a deterrent more often threatened than exercised. See e.g., United States v. Pino, 708 F.2d 523, 530 (10th Cir. 1983). In the appropriate case, however, exercise of such supervisory authority is essential lest the court be perceived to "brook behavior that degrades the grand jury into a rubber stamp, and the

testing of the prosecutor's evidence into an empty ritual." See United States v. Al Mudarris, 695 F.2d 1182, 1188 (9th Cir.), cert. denied, 461 U.S. 932 (1983). It is essential, therefore, that in an appropriate case, the district courts be able to back-up their admonitions and reprimands with the definitive action of dismissal.

II. THE PRACTICAL IMPOSSIBILITY OF PROVING ACTUAL PREJUDICE WOULD ELIMINATE DETERRENCE OF PROSECUTORIAL MISCONDUCT IN MANY CASES OF ABUSE

The decision below nevertheless authorizes district courts to dismiss criminal indictments only on a showing of actual prejudice to the defendant. As we have seen, harmless error analysis ignores the fact that repeated prosecutorial abuse may significantly impair the integrity of

the criminal justice system -- and public confidence in that system -- without causing actual prejudice that can be readily proved by a particular defendant.

A. Prosecutorial Misconduct Can Dramatically Impair Public Confidence Even if a Particular Defendant Does Not or Cannot Prove Actual Prejudice

Limiting the arsenal of weapons available to the district court in an egregious or extreme instance of prosecutorial misconduct can be expected to undermine public confidence in the criminal justice system. As this Court recently stated, even the "appearance of impropriety . . . diminishes faith in the fairness of the criminal justice system in general." Young v. United States, 107 S.Ct. at 2139.

The grand jury has been the focus of increasing criticism in recent years.[4/] Some of the criticism has focused on the availability to the prosecutor of a "terrible array of coercive methods" that can be used in secret and out of public view. Ibid. See United States v. Hogan, 712 F.2d 757, 759 (2d Cir. 1983)("The gain in prosecutors' influence over grand juries is all the more reason to insist that . . . limitations [upon prosecutorial conduct] be observed strictly") To permit misuse of these methods -- even in instances deemed harmless to a particular defendant -- could "impair public

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4/ See, e.g., Grand Jury Disclosure: Hearings on S.1676 before the Senate Committee on the Judiciary, 99th Cong. (Nov. 19, 1985); Grand Jury Reform: Hearings before the Subcommittee on Immigration, Citizenship and International Law," of the House of Representatives Committee on the Judiciary, 95th Cong. (Mar. 17 - June 29, 1977).

willingness to accept the legitimate use of those powers." Young v. United States, 107 S. Ct. at 2139-40. See Taylor v. Louisiana, 419 U.S. 522, 530 (1975) (community participation is essential to public confidence in the criminal justice system); see also M. Frankel & G. Naftalis, The Grand Jury 120 (1977) (importance of grand jury as a vehicle for citizen participation).5/

The continued viability of the grand jury process requires broad powers of

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5/ In federal courts, 81 percent of the criminal convictions obtained in fiscal 1982 were based on guilty pleas. Note, Double Jeopardy, Due Process, and the Breach of Plea Agreements, 87 Colum.L.Rev. 142, 142 n.1 (1987). Given this reality of the criminal justice system, the majority of defendants will never be judged by a jury of their peers. The grand jury is the only point where the community will participate in determining whether to impose criminal sanctions. Prosecutorial misconduct before the grand jury is thus highly detrimental to public confidence and the viability of the criminal justice system.

investigation in order to gather evidence of criminal activity. "As a grand inquest," this Court has stated, the grand jury is "a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation . . . ." Blair v. United States, 250 U.S. 273, 282 (1919). Public confidence is undermined, however, if the prosecutor uses the grand jury process for purposes inconsistent with its historic role. This occurs, for example, where the government attorney uses the grand jury "'for the sole or dominating purpose of preparing an already pending indictment for trial.'" United States v. Dardi, 330 F.2d 316, 336 (2d Cir. 1964)(quoting district court opinion). Where the abuse is

repeated and uncorrected -- despite admonition -- the public may properly fear "a possible revival of a version of the English Star Chamber." United States v. Doss, 545 F.2d 548, 549 (6th Cir. 1976). "[E]mployment of the grand jury as a discovery instrument to help the government prepare evidence to convict an already indicted defendant . . . would pervert its constitutional and historical function," ibid., and thus undermine confidence in the integrity of the judicial process.

By the same token, because a grand jury's investigatory powers are so extensive, it would be extremely tempting for any Civil Division or agency attorney to seek impanelment of a grand jury -- thereby gaining access to sworn testimony and pertinent documents -- when an independent investigation has become

frustrated. Absent proof of actual prejudice to a particular defendant, strong policy reasons may nevertheless warrant dismissal in the extreme case where evidence of misconduct is cumulative and egregious.

Similarly, public confidence is undermined if the government attorney improperly enlists the grand jury to assist in administrative investigations. Dissemination of grand jury information to government experts in an unrelated civil proceeding involving third-parties might not cause actual prejudice to the defendant -- but the practice, unchecked and pervasive, would destroy the appearance of grand jury independence.

In other instances, as well, public confidence will be undermined, even where a particular defendant cannot or does not

prove actual prejudice, because of prosecutorial abuse of the grand jury process. For example, there is a strong potential for abuse when news reporters or other media representatives are called as witnesses before the grand jury, when the prosecutor has reasonable basis to believe that they will claim a First Amendment privilege not to testify. "[O]fficial harassment of the press," this Court has stated, "undertaken not for purposes of law enforcement but to disrupt a reporter's relationship with his news sources would have no justification." Branzburg v. Hayes, 408 U.S. at 707-08. Under such circumstances, a particular defendant may not be able to prove actual prejudice. But the damage to public trust is great.

Concerns implicated by prosecutorial misconduct -- the integrity of the

criminal justice system, the perception of sovereign impartiality, and the ideal of public participation in the criminal process -- are too important for public confidence to leave the district courts without adequate remedy.6/ "The use of supervisory powers warns prosecutors that courts will act if prosecutors behave improperly. This warning might prevent future misconduct that otherwise would require the dismissal of indictments . . . ." Note, The Exercise of Supervisory Powers to Dismiss a Grand Jury Indictment, 45 Ohio St. L.J. at 1094. Lest the courts appear to condone conduct detrimental to the integrity of the judicial system, dismissal must remain a remedy available to the district court in an appropriate case.

6/ Dismissal, of course, leaves the prosecutor free to seek another indictment.

B. Actual Prejudice Is Difficult If Not Impossible to Prove

Finally, the requirement of actual prejudice impermissibly shifts to the defendant the burden of proving that errors caused by prosecutorial misconduct were not harmless.7/ This standard is inappropriate. It is extremely difficult, if not impossible, to prove actual prejudice even in cases where the alleged abuse or misconduct has impaired the independence and impartiality of the grand jury.

First, "[t]he prospect of peering into the grand jurors' minds, or of examining them individually, to ascertain whether . . . testimony was improperly used, is both impractical and unpalatable."

7/ By insisting that the defendant prove actual prejudice, the decision below improperly shifts the burden of proof from the government.

United States v. Hinton, 543 F.2d 1002, 1010 (2d Cir. 1976), cert. denied, 429 U.S. 1066 (1977). As one commentator explains:

> Because the defense attorney is barred from the proceedings and because grand jury proceedings are surrounded by secrecy, the defense attorney is often uninformed about the substance of the hearings. Moreover, no one knows exactly how grand juries function and what actually influences their decisions. The testimony of jurors cannot be determinative on the question of whether they were improperly influenced. Few people will admit that they were biased. Additionally, some jurors may not realize that they were improperly influenced.

Note, The Exercise of Supervisory Powers to Dismiss a Grand Jury Indictment, supra, at 1093. As Justice O'Connor stated in an analogous jury context, "Determining whether a juror is biased or has prejudged a case is difficult, partly because the juror may have and interest in concealing his own bias and partly because the juror may be unaware of it." Smith v. Phillips,

455 U.S. 209, 221-22 (1982)(O'Connor, Jr., concurring); see also Marshall v. United States, 360 U.S. 310, 312 (1959)(statement of jurors that they would not be influenced by publicity not dispositive).

Moreover, the very inquiry into state of mind jeopardizes the important policy of grand jury secrecy. See e.g., United States v. Pignatiello, 582 F.Supp. 251, 253 (D.Col. 1984); United States v. Sears, Roebuck & Co., 579 F.Supp. 1055, 1056 (C.D. Cal. 1984). The requirement of grand jury secrecy is presently codified in Rules 6(d) and (e) of the Federal Rules of Criminal Procedure. Its roots, however, are "older than our Nation itself." Pittsburgh Plate Glass v. United States, 360 U.S. 395, 399 (1959). As Anglo-American law has recognized for centuries, grand jury secrecy prevents intimidation of

jurors, protects the innocent accused, and insures that the grand jury has the opportunity to make an independent examination free from undue influence. United States v. Procter & Gamble, 356 U.S. 677, 681 (1958). The important policy of grand jury secrecy should not be undermined by requiring proof of actual prejudice before the district court may dismiss an indictment when prosecutorial misconduct is so egregious as to taint the criminal justice system itself.

CONCLUSION

The injury caused by prosecutorial misconduct in the grand jury process cannot be properly be assessed if district courts are limited to asking whether the defendant would have otherwise been indicted. This Court has expressly rejected such a narrow view of its supervisory authority. Most recently, this Court noted in Young v. United States, that "what is at stake is the public perception of the integrity of our criminal justice system. 107 S.Ct. at 2140. With so much at stake, district court judges must not be deprived of the remedies that they legitimately need to exercise properly supervisory authority over the grand jury process.

For the foregoing reasons, the

decision below should be reversed.

Respectfully submitted,

John A. Powell
(Counsel of Record)
Helen Hershkoff
Steven R. Shapiro
American Civil Liberties
Union Foundation
132 West 43 Street
New York, New York 10036
(212) 944-9800

David H. Miller
American Civil Liberties
Union Foundation
of Colorado
815 East 22 Avenue
Denver, Colorado 80205
(303) 861-2258

Richard F. Ziegler
Martha F. Davis
Cleary, Gottlieb,
Steen & Hamilton
One State Street Plaza
New York, New York 10004
(212) 344-0600

Dated: February 25, 1988